TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 203

THE CITY OF NEW YORK, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 203

THE CITY OF NEW YORK, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., Nov. 3, 1952.

—4671

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

THE CITY OF NEW YORK, Appellant, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellee.

In Proceedings for the Reorganization of a Railroad

No. 16562

STATEMENT UNDER RULE 15B

This proceeding was commenced on November 8, 1950 by service upon the office of the Corporation Counsel for the City of New York of a petition, verified on November 2, 1950, for instructions as to whether the plan of reorganization required the payment of certain assessments to the City of New York, and if the said instructions are in the negative that the Court direct the cancellation of such assessments.

The memorandum of decision of Hincks, U. S. D. J., was handed down on August 8, 1951 and the order and decree was made and filed on September 5, 1951. The City of New York filed a notice of appeal from this order and decree on September 19, 1951.

The above named appellee originally appeared by Hermon J. Wells, Esq., whose place has been taken by Edward R. Brumley. The appellant, the City of New York, originally appeared by John P. McGrath, Corporation Counsel, who has since been succeeded by Denis M. Hurley, present Corporation Counsel.

There have been no other changes in either the original parties or counsel, except as mentioned above.

[fol. 2] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

PETITION

Now comes The New York, New Haven and Hartford Railroad Company and respectfully represents to this Court:

1. Prior to the Commencement of the reorganization proceedings of your petitioner on October 23, 1935 under Section 77 of the Bankruptcy Laws of the United States, the City of New York from time to time laid upon certain real property belonging to and in the possession of your petitioner in the City of New York, County of The Bronx and the State of New York certain assessments for local improvements, of which those still outstanding and unpaid on real property owned and possessed by your petitioner are shown more particularly on a sheet marked Exhibit A, which is attached hereto and made a part hereof.

2. The City of New York at all times herein mentioned was and is a municipal corporation organized and existing under the laws of the State of New York.

3. In accordance with the laws of the State of New York, each of the aforesaid assessments, insofar as they [fol. 3] were valid and not void, became a lien in favor of the City of New York against the particular real property involved, until paid in full, as soon as its title and date of confirmation were entered in the record of the titles of assessments confirmed, together with the date of entry.

4. None of the assessments set forth on said Exhibit A has been paid in full because your petitioner believes them to be invalid and void, but the City of New York has claimed and asserted and continues to claim and assert that they constitute valid and enforcible claims, protected by valid and enforcible liens, upon the real property of your petitioner.

5. Since September 18, 1947, the effective date of the consummation order and final decree in the proceedings for the reorganization of your petitioner, repeated at-

tempts by your petitioner to sell, and to collect awards for the taking of, real property free and clear of the aforesaid assessments and liens without payment of the amounts due on the assessments have been resisted by the City of New York, and the City of New York has refused to cancel, discharge or remove any such assessments and liens of record without receiving payment in full.

6. Since September 18, 1947, the City of New York, though requested to do so by your petitioner, has refused to cancel, discharge or remove of record any of the assessments set forth in said Exhibit A, and still refuses to do so.

7. The assessments set forth in said Exhibit A constitute a cloud upon the title of your petitioner to the real property involved and constitute a continuous embarrassment and annoyance to the operations of your petitioner.

8. The City of New York, although it had timely notice of the reorganizatiion proceedings of your petitioner, has [fol. 4] at all times knowingly and intentionally refused to file or evidence a claim or claims in said proceedings for any or all of the outstanding, unpaid assessments for local improvements in its favor upon the real property of your petitioner, including those set forth in said Exhibit A, even though by the terms of Order No. 32, dated January 4, 1936, this Court directed that claims of creditors of your petitioner must be filed or evidenced by May 1, 1936 in order to participate in its reorganization, and no such claim or claims has been filed or evidenced in said proceedings in behalf of the City of New York by any one else.

9. It is your petitioner's belief that nowhere in the plan of reorganization approved by this Court and by the Interstate Commerce Commission or in the consummation order and final decree of this Court is there any reservation made in favor of the assessments set forth in said Exhibit A or any direction to pay or assume them, but that on the contrary they and the liens connected therewith are now forever barred, void, and unenforcible and the real property of your petitioner is now free and clear thereof and unencumbered thereby and discharged and released therefrom.

10. In the consummation order and final decree of this Court, in paragraph 2 of part XI, jurisdiction was reserved to the Court in sub-paragraph (d) to consider and

act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the consummation order and to construe the plan of reorganization as to matters which may require construction, not dealt with in the consummation order, and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the consummation order and the plan of reorganization and all other orders relative thereto previously entered by the Court.

[fol. 5] 11. The actions of the City of New York since September 18, 1947 with respect to outstanding, unpaid assessments for local improvements against the real property of your petitioner are in violation of the consummation order and final decree of this Court, particularly of paragraph 1 of part XI thereof, which perpetually restrains and enjoins all interfering with, enforcing liens upon, or disturbing in any manner whatsoever the property of your petitioner and all interfering with or taking steps to interfere with your petitioner, the operation of its properties or the conduct of its business.

Wherefore, your petitioner respectfully prays:

(1) That this Court instruct your petitioner whether or not the plan of reorganization and the consummation order and final decree require the payment or assumption of any or all of the assessments set forth in said Exhibit A or make any reservations in their favor;

(2) That in the event said instructions are in the negative, this Court declare (a) that the real property of your petitioner allegedly subject to the assessments set forth in said Exhibit A is free and clear thereof and of all liens therefor, (b) that the City of New York, its successors and assigns, be and they are forever restrained, enjoined and barred from enforcing the same, from starting or attempting to start any action or proceeding to enforce the same, and from interfering with or disturbing your petitioner and its real property on account of the same, and (c) that the City of New York be directed and ordered to cancel, discharge and remove of record all of the assessments set forth in said Exhibit A;

(3) That an order be entered setting down this petition for hearing before this Court and directing your petitioner

[fol 6] to give reasonable notice thereof to the City of New York and to serve a copy of this petition together with said notice of hearing on the City of New York by mail or otherwise.

The New York, New Haven and Hartford Railroad Company, By Hermon J. Wells, Hermon J. Wells, Vice-President and General Counsel.

(Verified on November 2, 1950.)

[fol. 7]

EXHIBIT A, ANNEXED TO PETITION

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2591	38	573	Sewer East 138th Street	June 8, 1894	$ 88.88
		10	2558	1	906	Opening Cypress Avenue	February 1, 1897	30.07
		10	2599	298	982	Sewer Bungay Street	December 15, 1897	217.14
		10	2604	74				123.63
		10	2588	23	1068	Regulating East 137th Street	February 17, 1899	923.13
		10	2730	101	1223	Sewer Tiffany Street	June 15, 1900	1,539.10
		10	2730	101				24.98
		10	2731	5				730.72
		10	2731	61				420.42
		10	2733	55				344.37
		10	2734	30				463.70
		10	2592	28	1411	Sewer East 141st Street	March 8, 1901	943.89
		10	2599	141				514.42
		10	2599	Pt. 141				588.05
		10	2730	101	1451	Opening Longwood Avenue	August 10, 1901	56.84
		10	2759	388	1487	Opening Aldus Street	December 19, 1901	44.79
		9	2295	1	1504	Opening East 135th Street	February 20, 1902	60.69
		9	2295	48				20.82
		9	2308	45				110.08

[fol. 8]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2730	28	1547	Opening Craven Street	May 29, 1902	$ 40.32
		10	2558	1	1557	Opening East 130th Street	June 23, 1902	6.64
		10	2731	61	1568	Regulating Tiffany Street	June 27, 1902	98.04
		10	2733	55				98.04
		10	2730	101	1637	Opening Whitlock Avenue	January 7, 1903	286.95
		10	2730	101				2.66
		10	2759	388				44.99
		10	2591	38				7.41
		9	2260	62	1670	Opening East 132nd Stre-t	March 20, 1903	753.90
		9	2295	48				141.10
		10	2583	2				23.85
		10	2583	2				17.00
		10	2584	18				159.00
		10	2585	20				10.52
		10	2599	141	1721	Opening East 142nd Street	August 18, 1903	14.62
		10	2599	200				24.48
		10	2592	28	1736	Regulating East 141st Stre-t	November 4, 1903	495.85
		10	2599	141				308.90
		10	2730	101	1762	Regulating Longwood Avenue	December 29, 1903	1,459.66
		10	2731	5				497.33

[fol. 9]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2592	28	1768	Regulating Southern Boulevard	December 31, 1903	$ 5.56
		10	2599	141				28.31
		10	2741	1	1785	Sewer Farragut Street	April 20, 1904	649.83
		10	2741	66				297.67
		10	2759	388				907.58
		10	2584	18	1855	Paving East 133rd Street	December 15, 1904	424.43
		10	2585	20				406.46
		10	2741	1	1882	Opening Whitlock Avenue	March 4, 1905	180.36
		10	2741	66				124.99
		10	2592	28	1954	Paving East 141st Street	July 13, 1905	429.46
		10	2599	141				234.07
		10	2599	141				267.55
		10	2730	Pt. 28	1963	Opening Leggett Avenue	August 2, 1905	2,145.34
		10	2730	Pt. 28				28.92
		10	2730	28				2,049.96
		10	2730	Pt. 28				49.09
		10	2730	28				118.70
		10	2730	28				378.93
		10	2730	28				21.46

[fol. 10]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2731	5	1974	Regulating Lafayette Avenue	October 3, 1905	$ 39.80
		10	2731	5				80.83
		10	2731	61				72.36
		10	2731	61				296.00
		10	2558	1	3008	Acquiring title East 149th Street	December 14, 1906	1.02
		10	2730	28	3030	Opening Randall Avenue	February 20, 1907	10.33
		10	2730	28				78.65
		10	2730	28	3046	Opening Lafayette Avenue	March 19, 1907	0.23
		10	2730	101				50.85
		10	2730	101				4.74
		10	2730	101				15.83
		10	2730	101				34.75
		10	2730	101				13.05
		10	2731	5				5.71
		10	2731	5				17.22
		10	2731	5				121.31
		10	2731	61				313.88
		10	2731	61				481.32
		10	2733	55				1,205.64
		10	2759	100				135.62
		11	3017	6	3069	Regulating Westchester Avenue	April 23, 1907	1,281.29
								1,932.12

[fol. 11]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2591	38	3108	Regulating East 140th Street	July 2, 1907	$ 259.94
		10	2592	28				258.24
		10	2731	61	3127	Sewer Whitlock Avenue	August 13, 1907	31.68
		11	3017	6	3138	Regulating Edgewater Road	September 12, 1907	487.28
		10	2588	23	3145	Paving East 136th Street	September 12, 1907	407.63
		9	2260	62	3173	Opening East 133rd Street	November 12, 1907	60.90
		10	2731	61	3175	Opening Barretto Street	November 18, 1907	12.60
		10	2731	61				1.89
		10	2733	55				703.10
		10	2741	1				47.99
		10	2741	1	3200	Opening Coster Street	February 3, 1908	22.38
		11	3017	6	3220	Receiving Basin West Farms Road	March 19, 1908	73.05
		10	2590	45	3222	Regulating East 139th Street	March 24, 1908	426.66
		10	2591	38				426.66

[fol. 12]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2591	38	3247	Sewer East 140th Street	May 12, 1908	$ 748.53
		10	2592	28				748.53
		10	2590	45	3255	Sewer East 139th Street	May 21, 1908	714.85
		10	2591	38				714.85
		15	4025	27	3268	Opening White Plains Road	June 10, 1908	237.59
		15	4041	1				198.24
		15	4018	22	3269	Opening White Plains Road	June 12, 1908	21.80
		10	2730	28	3322	Opening East 149th Street	November 16, 1908	0.21
		10	2759	388				.02
		11	3017	6				.15
		10	2583	2				.56
		10	2558	1				.17
		10	2583	2				1.08
		10	2583	2				1.50
		10	2583	2				.60
		10	2583	2				1.54
		10	2741	1	3350	Paving Garrison Avenue	February 25, 1909	3,031.89
		10	2741	66				1,816.49

[fol. 13]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2730	101	3384	Opening Garrison Avenue	June 19, 1909	16.93
		10	2741	66				1.00
		10	2755	133				.33
		10	2755	133				1.00
		10	2583	2	3427	Opening East 136th Street	November 26, 1909	30.78
		15	4023	27	3455	Regulating Taylor Street	December 31, 1909	80.09
		15	4024	29				110.23
		10	2734	30	3458	Sewer Garrison Avenue	January 13, 1910	4,712.97
		10	2730	101	3469	Opening Spofford Avenue	February 7, 1910	0.95
		10	2604	74				9.21
		10	2741	1	3535	Regulating Faile Street	July 20, 1910	79.52
		10	2741	66				34.54
		10	2733	55	3577	Paving Whitlock Avenue	November 22, 1910	26.00
		10	2741	66	3585	Regulating Bryant Avenue	December 2, 1910	578.23

[fol. 14]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2733	55	3586	Regulating Garrison Avenue	December 2, 1910	66.71
		10	2734	30				3,582.66
		10	2730	28	3639	Opening Garrison Avenue	March 14, 1911	1.00
		10	2730	28				4,230.00
		10	2730	28				4,230.00
		10	2730	101				9,269.00
		10	2730	101				1.00
		10	2730	101				1.00
		10	2730	28				386.00
		10	2731	5				1.00
		10	2731	61				1.00
		10	2604	72				1.00
		10	2604	74				452.14
		10	2604	74				126.48
		10	2604	74	3723	Sewer Truxton Street	December 8, 1911	731.25
		10	2604	74				33.97
		10	2604	74				433.35
		10	2604	74				237.93
		10	2730	28				25,492.50
		10	2730	101				1,899.00
		10	2730	101				1,026.00
		10	2731	5				4.50
		10	2731	61				257.80
		10	2733	55				561.60
		10	2734	30				531.00
		10	2599	200				838.93
		10	2599	295				1,150.33
								252.00

[fol. 15]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered		Outstanding Principal Amount
70605	A-88	10	2599	298	3723	Sewer Truxton Street	December 8, 1911		297.00
		10	2604	72					1,311.75
		10	2604	72					244.85
		10	2604	74					5.40
		10	2604	251					103.50
		10	2604	295					27.00
		10	2730	28					261.00
		10	2730	28					63.00
		10	2730	101	3727	Paving Longwood Avenue	December 22, 1911		1,261.10
		10	2730	101					121.88
		10	2731	5					92.40
		10	2586	20	3766	Paving East 135th Street	March 15, 1912		557.90
		10	2587	22					602.06
		10	2730	28	3877	Regulating Leggett Avenue	December 20, 1912	1	3.29
							December 20, 1913	2	4.73
							December 20, 1914	3	4.60
							December 20, 1915	4	4.43
							December 20, 1916	5	4.26
							December 20, 1917	6	4.10
							December 20, 1918	7	3.94
							December 20, 1919	8	3.77
							December 20, 1920	9	3.61
							December 20, 1921	10	3.44

[fol. 16]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered		Outstanding Principal Amount
70605	A-88	10	2730	28	3877	Regulating Leggett Avenue	December 20, 1916	5	$ 10.33
							December 20, 1917	6	9.94
							December 20, 1918	7	9.53
							December 20, 1919	8	9.13
							December 20, 1920	9	8.73
							December 20, 1921	10	8.34
		10	2741	1	3950	Regulating Garrison Avenue	June 6, 1913		201.40
		15	4025	27	3974	Regulating White Plains Road	October 10, 1913		1,999.55
		15	4041	5/1					181.06
		10	2604	74	5009	Regulating East 149th Street	June 16, 1914		40.00
		9	2277	20	5114	Opening East 161st Street	July 12, 1915		1.00
		10	2604	74					2.84
		10	2730	101	5145	Opening East 156th Street	December 10, 1915		4.03
		15	3904	1	5246	Regulating Tremont Avenue	December 15, 1916		17,891.00
		10	2759	388	5319	Opening Ludlow Avenue	December 27, 1917		1.00
		10	2759	388					333.28

[fol. 17]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	15	4042	1	5445	Opening Cruger Avenue	April 27, 1920	3,042.44
		15	4018	22	5500	Acquiring Title Adams Street	June 3, 1921	289.12
		15	4022	26				1.00
		15	4022	26				160.12
		15	4022	26				1.00
		15	4023	27				1.00
		15	4023	27				1.00
		15	4042	1	5505	Opening Cruger Avenue	July 28, 1921	192.10
		15	4018	22	5507	Acquiring Title Kinsella Street	September 23, 1921	0.26
		10	2730	28	5559	Regulating East 149th Street	June 29, 1922	139.00
		10	2730	101				90.00
		10	2604	74				3,879.00
		10	2604	74				880.00
		17	5064	1	5597	Regulating Bronx Boulevard	April 3, 1923	40.00
		17	5131	1	6376	Sewer East 177th Street	January 15, 1930	120.00
							Grand Total	$134,153.94

[fol. 18] IN UNITED STATES DISTRICT COURT

REVISED ORDER OF NOTICE—November 6, 1950

It having been called to the attention of the Court that under General Order in Bankruptcy No. 49 (11) all process to be served outside of the District in which proceedings under Section 77 are pending shall be directed to and served by the United States Marshal for the District in which service is to be effected, it is Ordered:

(1) That the petition of The New York, New Haven and Hartford Railroad Company, dated November 2, 1950 and filed herein on that date, relating to special assessments laid upon certain real property of that Company in the City of New York for local improvements, is hereby set down for hearing in this Court at two o'clock in the afternoon, E.S.T., or as soon thereafter as the Court can hear the same, on the 20th day of November, 1950, at New Haven, Connecticut, and

(2) That the Clerk of this Court is hereby directed to immediately transmit three copies of this order and of said petition to the United States Marshal for the Southern District of New York, who, pursuant to the General Orders in Bankruptcy, is directed to serve the same upon the Comptroller of the City of New York and upon the Corporation Counsel of that City.

(3) That the Order of Notice entered herein November 2, 1950, is hereby rescinded.

Enter:

C. C. Hincks, District Judge.

Dated: November 6, 1950.

[fol. 19] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF GEORGE H. WEBSTER, IN SUPPORT OF PETITION

STATE OF CONNECTICUT,
County of New Haven, ss.:

GEORGE H. WEBSTER, being duly sworn, deposes and says:

1. I am Tax Agent of The New York, New Haven and Hartford Railroad Company, petitioner herein, and I am familiar with the subject matter of the petition herein.

2. This affidavit is based principally on records, files, and papers in the possession of petitioner.

3. This affidavit is made in support of said petition and in answer to the affidavit of Meyer Scheps, sworn to on December 14, 1950, submitted in opposition to said petition, but no attempt is here made to answer the arguments, opinions and conclusions contained in said affidavit.

4. With respect to the matters referred to in paragraphs 9 and 10 of said affidavit by Meyer Scheps, I am advised by counsel that under the law of the State of New York assessments which are void as a matter of law are void, invalid, and unenforcible even though the usual procedures for reviewing their validity are never undertaken, and that it has always been and is the claim of petitioner and petitioner's trustees that the assesments set forth in Ex-
[fol. 20] hibit A attached to the petition herein were and are void as a matter of law.

5. With respect to the matters referred to in paragraph 21 of said affidavit of Meyer Scheps, it does not appear in any of the papers on file in the reorganization proceedings prior to the present petition that the liens of the City of New York were ever brought to the attention of the reorganization court, that said court ever passed on their validity or that said court had any knowledge of their existence; furthermore, the deed executed by petitioner's trustees to petitioner nowhere specifically refers to said liens and transfers all real property held by petitioner's trustees from them to petitioner "free and clear of all claims, rights, demands, interests, liens, encumbrances of creditors or other obligees * * * of the Trustees or their predecessors * * * except the obligations imposed * * * by

the Consummation Order or assumed * * * pursuant to the Consummation Order * * *."

6. The assessments referred to in paragraphs 26, 27 and 28 of said affidavit of Meyer Scheps were paid by petitioner's trustees not because they were valid but solely because the City of New York refused to pay to them money due them as the sole proceeds from property sold (in lieu of condemnation) to the City of New York for widening Whitlock Avenue, unless said assessments were first paid. Before paying said assessments, petitioner's trustees obtained from the City of New York an apportionment of the previous outstanding unpaid assessments, which covered the property being sold and other property adjacent thereto belonging to said trustees. No payment of or offer to pay the assessments remaining unpaid on said adjacent property after said apportionment was ever made by said trustees or petitioner.

[fol. 21] 7. The assessment referred to in paragraph 29 of said affidavit of Meyer Scheps was not paid by petitioner or its trustees. The City of New York itself paid this assessment by way of set-off in order to make collectible by it an award made in 1911 to petitioner for the taking of petitioner's property for Taylor Avenue but never collected by petitioner.

8. The assessment referred to in paragraph 33 of said affidavit of Meyer Scheps was paid by petitioner's trustees not because it was valid but solely because the City of New York refused to pay to them money due them as the sole proceeds from property sold (in lieu of condemnation) to the City of New York for a new parkway (the Bronx River Parkway Extension), unless said assessment was first paid, but by compromise agreement with the City Collector of the City of New York, the assessment was paid off by paying only one third of the principal amount due plus interest to May 15, 1940, in recognition of petitioner's claim that the assessment was invalid.

9. The assessments, taxes and water charges referred to in paragraphs 26 through 30 and 33 of said affidavit of Meyer Scheps were all paid by petitioner's trustees without any representation or promise being made then or at any other time by any authorized person to the City of New

York that any other assessments, taxes or water charges would also be paid or that petitioner, its trustees or their counsel considered any of said paid or unpaid assessments, taxes and water charges proper or valid, and said payments were made without reference to or consideration of any proposed or completed plan of reorganization and at a time before petitioner's reorganization was completed when it was not yet too late for the City of New York to petition the reorganization court for leave to file a late claim in said reorganization proceedings.

10. The statement of the debtor's assets and liabilities as of the close of business on October 23, 1935 filed with [fol. 22] the reorganization court on December 5, 1935 and similar succeeding statements through December 31, 1940, referred to in paragraphs 36, 37 and 38 of said affidavit of Meyer Scheps, each contained a schedule setting forth current tax liabilities but did not include pre-bankruptcy tax liabilities incurred before 1935. Such schedules after December 31, 1940 were similarly compiled and filed, but were thereafter placed under Item 767 instead of Item 771. These schedules never have contained any amounts for assessment liens of the City of New York.

11. The City of New York, through its Corporation Counsel and its City Collector, had actual notice of petitioner's being in reorganization under the bankruptcy laws by June of 1936 or earlier, but has never from October 23, 1935 to the time of its opposition to petitioner's present petition attempted to intervene in said reorganization proceedings, to file a claim therein, or to petition the court in charge of said proceedings for opportunity to file a claim therein or for any other relief.

12. The terms of Order No. 32 in the reorganization of petitioner, which provided in part that claims of creditors of petitioner were to be filed or evidenced by May 1, 1936 in order to participate in the reorganization, were promptly published in the Wall Street Journal in the City and State of New York once a week for two consecutive weeks, as directed by said order.

13. No instance has been found where petitioner or petitioner's trustees ever did or said or wrote anything which could reasonably lead the City of New York to

believe that its unpaid assessments were deemed valid, were all going to be paid, were provided for in the plan of reorganization, or need not be proved to the reorganization court like the disputed claims of other creditors.

George H. Webster.

(Sworn to on January 23, 1951.)

[fol. 23] IN UNITED STATES DISTRICT COURT

ANSWER OF THE CITY OF NEW YORK—December 12, 1950

The City of New York, appearing specially for the sole purpose of answering the Petition herein, of The New York, New Haven and Hartford Railroad Company, dated November 2, 1950, and for no other purpose, respectfully shows to this Court and alleges as follows:

First: Admits the allegations contained in Paragraphs 1, 2, 6 and 10 of the Petition herein.

Second: Admits the allegations of Paragraph 3 of the Petition herein except that it denies that any of the assessments set forth in Exhibit A of the Petition were or are void.

Third: Denies the allegations contained in Paragraph 4 of the Petition herein, except that it admits that none of the assessments set forth on Exhibit A attached to the Petition herein and made a part thereof, have been paid in full or in part, and that the City of New York claims and asserts and continues to claim and assert that such assessments constitute valid and enforceable claims protected by valid and enforceable liens upon the specific parcels of real property of the Petitioner against which they are imposed.

Fourth: Denies each and every allegation contained in Paragraph 5 of the Petition herein except that it admits [fol. 24] that it has refused and continues to refuse to cancel, discharge or remove any of the assessments contained in Exhibit A annexed to the Petition herein, and the liens thereof without receiving payment in full therefor,

and that the City of New York has at all times insisted on and still insists on enforcement of its assessment liens.

Fifth: Denies each and every allegation contained in Paragraphs 7, 8, 9 and 11 of the Petition herein.

As and for a first, separate and distinct defense:

Sixth: That none of the proceedings in reorganization had herein on and after October 23, 1935, including the Plan of Reorganization and the Final Decree herein, materially and adversely affected, nor were they intended to materially and adversely affect, the assessment liens of the respondent, the City of New York.

Seventh: That the Plan of Reorganization certified by the Interstate Commerce Commission and approved by this Court and the Consummation Order and Final Decree of this Court reserved the assessments set forth in Exhibit A annexed to the Petition herein, in favor of the City of New York and directed the reorganized company to pay or assume such assessments.

As and for a second, separate and distinct defense:

Eighth: That at no time since October 23, 1935, the date of the commencement of the proceedings to reorganize the Petitioner herein, did this Court acquire or exercise jurisdiction over the subject matter set forth in the Petition [fol. 25] herein or over the assessment liens of the City of New York or over the person of the City of New York.

As and for a third, separate and distinct defense:

Ninth: That throughout the course of the Reorganization Proceedings herein the Debtor, its Trustees or their counsel on numerous occasions negotiated with the respondent, The City of New York, with respect to taxes, assessments and water charges which had become liens on the real property of the Debtor prior to inception of such proceedings.

Tenth: That at all times in their negotiations as aforesaid, the Debtor, its Trustees and counsel treated the assessments of the respondent as valid, subsisting and prior liens which were not affected by the Reorganization Proceedings.

Eleventh: That by reason of their conduct, as aforesaid,

the petitioner is now equitably estopped and barred from seeking the relief demanded in its Petition herein.

Wherefore, the Respondent City of New York respectfully prays as follows:

1. That the Petition herein be dismissed for want of jurisdiction in this Court, or, in the alternative:

2(a). That this Court construe the Plan of Reorganization and the Consummation Order and Final Decree as restoring to the City of New York its rights to enforce its assessment liens and requiring the payment or assumption by the Petitioner of all of the assessments set forth in Exhibit A attached to the Petition herein, and

[fol. 26] 2(b). That an order be entered herein dismissing the Petition, and

3. That the Respondent, City of New York, be granted such other and further relief as may be justified in the premises.

The City of New York, By John P. McGrath, Corporation Counsel.

Dated: December 12, 1950.

(Verified on December 12, 1950)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MEYER SCHEPS, SWORN TO ON DECEMBER 14, 1950, IN OPPOSITION TO PETITION

STATE OF NEW YORK,
County of New York, ss.:

MEYER SCHEPS, being duly sworn, deposes and says:

1. I am an Associate Assistant Corporation Counsel of the City of New York, fully familiar with all of the matters hereinafter set forth. The counsel for the respondent, pursuant to the Laws of the State of New York and the New York City Charter, is John P. McGrath, Corporation Counsel of the City of New York.

[fol. 27] 2. All of the matters hereinafter set forth which relate to proceedings in reorganization of the Debtor herein were obtained by your deponent from an examination of the records in the office of the Clerk of this Court, since the entry of the Consummation Order and Final Decree herein. This affidavit, however, and the facts related herein do not presume to exhaust the entire record of the proceedings for reorganization of the Debtor. The magnitude of the record precluded a complete and thorough study thereof by your deponent within the period of his investigation. Nevertheless, your deponent is of the opinion that he has uncovered evidence of the lack of intent to affect the City's liens by the reorganization proceedings which is sufficient to warrant the denial of the present application. However, there may be additional facts and circumstances which may be culled from the record which will further support and corroborate the City's position. Permission is therefore sought of this Court to refer to such additional material as counsel for respondent may be able to uncover before the date of the hearing herein not included in this affidavit. Deponent further requests that the entire record be deemed a part of the present application so that the record on this application shall be full and complete for all purposes.

3. This affidavit is made in opposition to a petition herein of The New York, New Haven and Hartford Railroad Company which seeks an order (a) for instructions pursuant to the Consummation Order and Final Decree herein, (b) directing that the real property of said Petitioner subject to the assessments set forth in Exhibit A annexed to its petition be declared free and clear thereof and of all liens therefor, (c) that the City of New York be restrained, enjoined and barred from enforcing said assessments or their liens, and (d) that the said City be directed and ordered to [fol. 28] cancel, discharge and remove of record all of the said assessments.

4. The City of New York is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

5. The City of New York has a plan of government which is set forth in the New York City Charter (William's Press) 1943, adopted by referendum November 3, 1936, in effect

January 1, 1938. To carry out the provisions of this Charter, the Legislature of the State of New York provided an Administrative Code of the City of New York (Laws of New York, 1937, Chap. 929).

6. Prior to the enactment of the New York City Charter, the plan of government of the City of New York was contained in the Greater New York Charter (Laws of New York, 1897, Chap. 378, as revised by Laws 1901, Chap. 466), and in earlier charters enacted by the Legislature of the State of New York.

7. Each and every one of the assessments set forth in Exhibit A attached to the petition herein, was levied pursuant to and in conformity with the applicable provisions of the charter of the City of New York in effect at the time of the levy. Each and every one of the said assessments became specific liens upon the respective parcels of property listed in said Exhibit ten days after their several dates of entry set forth in the column "Date Entered" appearing on the said Exhibit A. The principal amount of these liens is the sum of $134,153.94. Interest thereupon computed at the legal rate of 7% per annum to December 31, 1950 is $369,653.92. The total of principal and interest due on said liens is $503,807.86 as of December 31, 1950.

[fol. 29] 8. Each and every one of the liens referred to was perfected in the manner prescribed by law prior to October 23, 1935, the date on which the New York, New Haven and Hartford Railroad Company petitioned this Court for an order permitting its reorganization under the provisions of § 77 of the Bankruptcy Act.

9. The several charters under which the City of New York operated at the time of the assessment of each of the individual assessments in question provided complete and adequate methods of making objection thereto and a complete, thorough and adequate method of review of the determination of any board of assessors or court of record. The New York, New Haven and Hartford Railroad Company, however, failed and neglected to make any objection to the determination of the appropirate board of assessors or court of record, or if such objection was in any instance made, the Railroad Company either failed or neglected to pursue the remedy of judicial review provided in the ap-

propriate city charter or failed to sustain its objections in any judicial review.

10. The time in which such objections could be made or judicial review obtained expired, with respect to each and every one of the assessments contained in Exhibit A attached to the petition, long before October 23, 1935, the date of the commencement of the proceedings to reorganize the New York, New Haven and Hartford Railroad Company. In fact, the last assessment in point of time prior to October 23, 1935, contained in Exhibit A attached to the petition herein, was entered on January 15, 1930, and became a lien on January 25, 1930. With respect to this assessment, the Greater New York Charter, § 963, then in effect, provided that proceedings to vacate or reduce assessments in the City of New York were to be brought within one year [fol. 30] after confirmation thereof. § 950 of the same charter set forth the procedure under which objections could be made to the assessment and directed the Board of Assessors, after confirming the assessment, to transmit it to the Comptroller for entry.

11. The assessments for benefit set forth in Exhibit A, all of which were levied prior to October 23, 1935, and the liens thereof, constitute and at all times did constitute specific liens against the respective parcels of real property designated by block and lot numbers on the Tax Map of the City of New York, and were enforceable exclusively as such liens but without any personal liability attaching to the owner of any such affected parcel of real property.

12. Further, these specific liens, from the moment of their attachment to the individual parcels of real property affected thereby, under the laws of the State of New York and the several city charters above referred to, became first, prior and paramount liens against such specific parcels of real property. These liens did not constitute either personal obligations of the owner of the specific property affected or did they attach as liens to any or all other properties of the specific owner.

13. The remainder of this affidavit will be devoted to a demonstration of three points: (1) that the proceedings before this Court and the Interstate Commerce Commission show that the reorganization was never intended to affect

the assessment liens of the City of New York; (2) that the course of conduct of the Debtor and the Trustees was such as to clearly indicate that the assessment liens of the City of New York were not to be affected by the reorganization proceeding—indeed, this course of conduct estops the reorganized company from now claiming that the assessment [fol. 31] liens were intended to be included within the Plan of Reorganization; and (3) that the assessment liens of the City of New York are not barred by Order No. 32 in which the time for filing claims was fixed by this Court.

I

14. On October 23, 1935, the date when the New York, New Haven and Hartford Railroad Company petitioned this Court for reorganization under § 77 of the Bankruptcy Laws of the United States, each of the specific parcels of real property set forth in Exhibit A of the petition herein and individually described by block and lot number therein, was subject to a prior and paramount lien in rem in favor of the City of New York. Therefore, when by Order No. 1 in this reorganization proceeding this Court took jurisdiction over the property of the Debtor, that jurisdiction was subject to the aforesaid liens in favor of the City of New York. Specifically, Order No. 1 aforesaid provided in Paragraph (3) thereof:

> "That the Debtor is authorized in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:
>
> "(a) All taxes and assessments due or to become due upon the properties, income, franchises or business of the Debtor; * * *"

15. The Debtor and its Trustees were therefore specifically charged with the duty to make payment of these assessments. The order of this Court explicitly recognized that taxes and assessments due at the time of the filing of the Petition in Reorganization were not to be affected by the proceedings, unless by further order of the Court payment was affirmatively enjoined.

[fol. 32] 16. Order No. 1 provided (Paragraph 10) that notice of the hearing for the appointment of trustees was to

be given by publication directed to creditors and stockholders and by mailing copies of the said order to the Debtor's mortgage trustees. Thus, notice was directed to be brought home to the mortgage trustees who, but for the existence of tax liens, would be the highest group of lien creditors. It seems clear that had the most preferred group, i. e., tax lienors, been intended to be affected by the reorganization proceedings, notice would have been directed to be given to them by mail as well.

17. Likewise, Order No. 32, dated January 4, 1936, provided (Paragraph 5) for the same form of mailed notice to mortgage trustees. Publication was directed as against other creditors. Since this was the order which fixed the time for filing of claims, it is apparent that had it been intended that the City would be required to file claims, notice would have been required to be mailed to it.

18. The entire course of the reorganization proceeding from that point on clearly indicates that there was never any intention to disaffirm the assessments levied by the City of New York or to alter, modify or satisfy them. Furthermore, the first report of the Interstate Commerce Commission approving the original Plan of Reorganization specifically provided for the payment of or assumption by the reorganized company of liens prior in rank to the lien of the first mortgages (Record, p. 7980). Thereafter, the Plan, both as originally proposed and modified, always considered tax liens as outside its scope. If further proof is needed that this was always the intent, it is significant that when the City of Boston questioned whether or not the Plan of Reorganization might materially or adversely affect the security of its lien, this Court pointed out that [fol. 33] the Plan of Reorganization as finally adopted and confirmed specifically provided "that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property." (Plan of Reorganization, Paragraphs N[4][d]; Paragraph O[2][4]). In addition, the Plan of Reorganization as originally promulgated and approved provided at Paragraph L as follows:

> "Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority

over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors. * * *"

19. The first report of the Interstate Commerce Commission certifying the Plan of Reorganization stated (Record, p. 7980):

> "The plan should also provide for the satisfaction of (a) current liabilities of the principal debtor incurred in the ordinary conduct of its business prior to the institution of the reorganization proceeding which are entitled to priority over any mortgages of the principal debtor, * * *"

After providing that such claims to the extent unpaid should be assumed or paid by the reorganization company, the Interstate Commerce Commission's report concluded by finding that "such claims against the principal debtor, when so treated, are not materially and adversely affected by the plan." The language quoted from Paragraph L of [fol. 34] the Plan of Reorganization was contained in the Plan as originally submitted and remained therein throughout all of its subsequent modifications. That was the Plan which was finally confirmed by this Court.

20. It is therefore clear that in dealing with tax liens of the various municipalities in which the Debtor owned and held properties, it was never intended to affect, alter, modify or satisfy the assessment liens of the City of New York. On the contrary, it affirmatively appears that it was intended that such liens should remain intact and in full force and effect.

21. Nowhere in any of the papers on file in this proceeding is there any indication that the liens of the City of New York were considered other than as being materially or adversely affected by the Plan. Indeed, the contrary appears in the deed of all of the Debtor's property, executed by Howard S. Palmer, James Lee Loomis and Henry

B. Sawyer, as Trustees of the Debtor, as grantors, to New York, New Haven and Hartford Railroad Company, as grantee. This conveyance, dated September 18, 1947 and recorded in the office of the New York City Register in the County of Bronx on October 17, 1947, in Liber 1567 of Conveyances at page 492, was executed in compliance with the Consummation Order and Final Decree of this Court. Significantly, this deed provided that the conveyance of the properties was "subject also, in so far as the property by this Indenture remised, released, transferred, assigned, conveyed, quitclaimed and set over may be subject to the liens of taxes and assessments lawfully levied or assessed against the same, to any and all such liens." Here again, at the very consummation of the whole proceeding appears clear evidence that from beginning to end the Debtor and its Trustees, with the *express* approval of this Court, con- [fol. 35] sidered that the assessment liens of the City were to remain valid and subsisting liens against each of the specific properties affected thereby in the hands of the reorganized company. This deed, both in form and substance, was approved specifically by this Court in Order No. 1007, the Consummation Order and Final Decree, in Part III, Paragraph 1, Subdivision 12. The provision of the order which approved this instrument, among others, is as follows (Record, pp. 13256-7):

"III

"Approval of Documents and of Fiduciaries and Agents under the Plan

1. *Approval of Documents.* The form and substance of each of the following documents, as filed and deposited by the Committee with the Clerk of this Court in connection with its petition for the entry of this order, together with the changes therein, approved by the Court at the hearing upon said petition, *are approved and found and adjudged to be in all respects in accord with the true intent and requirements of the Plan and necessary and proper to carry it into effect:*

" * * *

"(12) Form of Deed from Howard S. Palmer, James Lee Loomis and Henry B. Sawyer as Trus-

tees in bankruptcy of the properties of the Debtor and the Secondary Debtors to The New York, New Haven and Hartford Railroad Company (the Reorganized Company).

"* * *" (Emphasis supplied.)

The substance of this deed provided, among other things, that the reorganized company took title to the property [fol. 36] subject to *all* tax and assessment liens. In approving this deed both as to form and substance this Court necessarily found that it carried out the true intent of the Plan of Reorganization. This intent is conclusively shown to be what we have urged, namely, that the assessment liens of the City of New York were never intended to be affected by the reorganization proceedings.

22. It therefore follows since the assessment liens of the City of New York were never intended to be affected by the reorganization proceedings that there is nothing in the Plan of Reorganization left to construe. Therefore, this Court has no jurisdiction to entertain the present application.

II

23. The entire course of conduct of the Debtor and its Trustees in reorganization was such, and until only recently continued to be such, as to clearly indicate that the assessment liens of the City were not in question. In fact, the conduct of the Debtor and its Trustees indicates that their construction of the reorganization plan was always the same as that heretofore advanced in this affidavit under Subdivision I. Furthermore, the entire course of dealing throughout the reorganization proceedings was such that the City of New York had every right to believe that its liens were being fully and adequately protected and that they would either be paid in full or would continue as liens after the reorganization proceedings had been consummated. Indeed, the entire course of conduct of the Debtor and its Trustees in this proceeding was such as to lull the City into a sense of security in the sanctity of its liens, and resultantly, that course of conduct estops the Railroad from now asserting that the liens were barred in the reorganization proceedings.

[fol. 37] 24. This course of conduct by the Debtor and its Trustees falls roughly into three categories: (a) the payment during reorganization of various assessments due to the City of New York which had accrued and become liens prior to the filing of the petition for reorganization; (b) the compromise during the reorganization proceedings by the Trustees of an assessment which had become a lien prior to the reorganization; and (c) the Debtor's treatment of all tax liabilities as indicated from its financial statement as of October 23, 1935, and the monthly statements filed in this proceeding thereafter.

25. Numerous New York City assessments for local improvements other than those which are in issue accrued and became liens on various properties of the New York, New Haven and Hartford Railroad Company, prior to October 23, 1935. The nature of these assessments was in many cases identical with those in issue and in other cases extremely similar. Yet it can and will be demonstrated that the Railroad paid such assessments in full during the reorganization proceeding.

26. For example, Assessment No. 3639, entered on March 14, 1911, in a proceeding for the opening of Garrison Avenue, contained an item of $8.34 which became a lien against premises Block 2731, Lot 5½ of 5. In the very same proceeding assessments for various sums were entered as liens against a number of Railroad properties on Blocks 2730, 2731, and 2604, all more fully shown on page 8 of Exhibit A annexed to the petition herein. The item which became a lien against Block 2731, Lot 5½ of 5, was paid on May 23, 1936, *subsequent to the time of the filing of the petition in reorganization.*

27. Assessment No. 3723, entered on December 8, 1911, in a proceeding for sewers in Truxton Street, contained [fol. 38] an item of $70.15 which became a lien against premises Block 2731, Lot 5½ of 5. In the very same proceeding, assessments for various sums were entered as liens against a number of Railroad properties on Blocks 2604, 2730, 2731, 2733, 2734 and 2599, all more fully shown on pages 8 and 9 of Exhibit A annexed to the petition herein. The item which became a lien against Block 2731, Lot 5½ of 5, was paid on May 23, 1936, *subsequent to the time of the filing of the petition in reorganization.*

28. Assessment No. 3727, entered on December 22, 1911, in a proceeding for paving Longwood Avenue, contained an item of $80.64 which became a lien against premises Block 2731, Lot 5½ of 5. In the very same proceedings, assessments for various sums were entered as liens against a number of Railroad properties on Blocks 2730 and 2731, all more fully shown on page 9 of Exhibit A annexed to the petition herein. The item which became a lien against Block 2731, Lot 5½ of 5 was paid on May 23, 1936, *subsequent to the date of the filing of the petition in reorganization.*

29. Assessment No. 3455, entered on December 31, 1909, in a proceeding for regulating Taylor Street, contained an item of $62.34 which became a lien against premises Block 4023, Lot 27. In the very same proceeding, assessments for various sums were entered as liens against a number of Railroad properties on Blocks 4023 and 4024, all more fully shown on page 7 of Exhibit A annexed to the petition herein. The item which became a lien against Block 4023, Lot 27, was paid on January 21, 1942, *subsequent to the date of the filing of the petition in reorganization.*

30. In addition to the specific items discussed above, there are numerous other items of benefit assessments, [fol. 39] real estate taxes, old school taxes and water charges which had become liens against specific parcels of the Debtor prior to the date of the reorganization and were paid after the Railroad went into reorganization.

31. Whatever reasons the Trustees may have had for paying the aforesaid items and not paying the items which form the basis of the present petition, the fact nevertheless remains that the paid items fall into the same category as the items which are still open. The payment of these items is proof of the practical construction of the Plan of Reorganization. Obviously, if it was intended that the Plan cover all accrued tax liens, the Trustees were derelict in their duty in paying any of these items. It must be inferred that such dereliction did not occur.

32. Furthermore, even if it could possibly be construed that accrued tax liens were contained within the Plan of Reorganization, the Trustees' conduct in paying some of

the items of this class created an estoppel against them in favor of the City of New York, as will more fully be discussed under Subdivision III, *post*.

b

33. On December 15, 1916, Assessment No. 5246 in a proceeding for regulating Tremont Avenue was entered against Block 3910, Lot 1, in the sum of $7,630. In the very same proceeding, an assessment in the sum of $17,891 was entered as a lien against other premises owned by the Railroad in Block 3904, Lot 1, as is more fully shown on page 10 of Exhibit A annexed to the petition herein. The lien against Block 3910, Lot 1, at the time the Debtor went into reorganization, was unpaid. By Order No. 238 of this Court, dated December 7, 1937, the Trustees were authorized to sell this parcel, among others, to the City [fol. 40] of New York in lieu of condemnation for park purposes. No mention of taxes or their payment was made in that order. When the time came for payment of the consideration, the City of New York maintained a right to set off against it the aforesaid unpaid assessment which was a lien on the property. Negotiations were entered into between counsel for the Trustees and the City of New York, which finally resulted in the payment of a sum of money in settlement and cancellation of this assessment sometime in September, 1940. From these facts it may again be inferred that the assessment liens of the City of New York were practically construed by the Trustees as being outside the Plan of Reorganization. Furthermore, at no time during the course of the negotiations was it ever contended by the Trustees or their counsel that this particular assessment lien was barred by the failure to comply with Order No. 32 of this Court. Again, if this assessment lien was included in the Plan of Reorganization, the Trustees were derelict in effecting a compromise. Such dereliction should not be presumed if a reasonable explanation otherwise exists.

34. Lastly, aside from questions of dereliction of duty or construction of the Plan of Reorganization, it is contended by the City of New York that the course of conduct of the Trustees and their counsel led it to believe that its

assessments and taxes would not be affected by the Plan of Reorganization. The City relied upon the Trustees' course of conduct. The Trustees and the reorganized company should now be estopped from maintaining to the detriment of the City of New York any position other than that which they maintained in their prior negotiations with the City of New York during the reorganization proceedings.

c

35. This Court, by Order No. 1 (Paragraph 7), dated October 23, 1935, made pursuant to § 77(c)(4) of the Bank-
[fol. 41] ruptcy Act, required the Debtor to "file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on October 23, 1935, and, within forty-five days after the close of each calendar month thereafter, * * * a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month."

36. A statement was filed by the Debtor on December 5, 1935 showing its assets and liabilities as of the close of business on October 23, 1935. Under "Liabilities" there appeared a sub-head entitled "Unadjusted Credits." Under this sub-head there appeared a subdivision as follows: "771—Tax Liability $2,024,931.12."

37. Thereafter, the Debtor or the Trustees filed monthly statements as required by the aforesaid order of the Court. In each of such statements, up to and including the one filed to indicate the financial status of the Railroad on December 31, 1940, Item 771—Tax Liability—was carried. The report showing the status on December 31, 1940 showed the tax liability as $4,881,272.55. However, the report showing the condition of the Debtor on January 31, 1941, *the ensuing month*, contained no mention of Item 771 or tax liability. Furthermore, none of the ensuing reports until the entry of the consummation and final decree herein contained Item 771 or an account for tax liability.

38. It is quite apparent that from the very outset of the reorganization proceedings the Debtor, and thereafter its Trustees, considered taxes accrued prior to the reorgan-

ization as an item which would have to be fully met by them. The only conclusion that can be drawn from the [fol. 42] disappearance of Item 771—Tax Liability—from the monthly balance reports is that all such taxes had been fully paid. As a matter of fact, I have been informed that the assessment liens of the City of New York were not included in the original listing of tax liabilities contained in Item 771 of the first monthly statement. Obviously, these liens were not intended to be affected by any future course of conduct. The significance of these facts as indicating the practical construction placed upon the Plan of Reorganization by the Debtor and its Trustees cannot be stressed too strongly.

39. The only reasonable conclusion which may be drawn from the facts outlined in this Subdivision II is that the Trustees, in the conduct of the business of the Debtor during reorganization, did in fact consider the assessment liens and other tax liens due to the City which had accrued prior to the institution of the proceedings as valid and binding liens which they were under a duty to pay. This actual treatment of these liens is in accord with our contention in Subdivision I that they fell into a class not materially or adversely affected by the Plan and is consistent with no other interpretation of the Plan. Indeed, if the proceedings had hereunder, the Plan of Reorganization and the reports of the Interstate Commerce Commission may be considered as being ambiguous in this respect, their practical construction by the Trustees in the conduct of the business of the Debtor must resolve this ambiguity in favor of the City of New York.

III

40. We have reserved for last the contention raised in Paragraph 8 of the petition that "The City of New York, although it had timely notice of the reorganization proceedings * * * has at all times knowingly and intentionally [fol. 43] refused to file or evidence a claim or claims in said proceedings for any or all of the outstanding, unpaid assessments for local improvements in its favor upon the real property of your petitioner, including those set forth in said Exhibit A, even though by the terms of Order No. 32, dated January 4, 1936, this Court directed that claims of

creditors of your petitioner must be filed or evidenced by May 1, 1936 in order to participate in its reorganization, and no such claim or claims has been filed or evidenced in said proceedings in behalf of the City of New York by any one else.''.

41. As we have conclusively demonstrated in Subdivisions I and II above, the assessment liens in question were never intended to be affected by the reorganization of the Debtor Railroad. There never was any occasion for the participation by the City of New York in the reorganization. In consequence, Order No. 32 was not directed nor intended to be directed to the City of New York. Notice of the contents of Order No. 32 was to be given by publication in certain specified newspapers directed to creditors, *and by mailing* copies of the order to the mortgage trustees or their counsel. In view of the fact that the City's assessment liens are prior and paramount in lien to those of any mortgagee, and the further fact that the Court deemed it necessary to bring home notice personally to such mortgagees (who but for the City's prior lien constituted the highest liens on the Debtor's property), it must be assumed that the Court never intended by that order that the City of New York file a claim for its assessment liens or be thereafter forever barred.

42. Even if it could possibly be maintained that the assessment liens of the City of New York were intended to be affected by the reorganization proceeding, Order No. 32 did not legally and effectively bar them, because it was not [fol. 44] specifically directed to the City of New York nor was it ever personally served upon the City of New York. Hence, Order No. 32 did not confer on the Court jurisdiction to deal with the City's liens. In our memorandum of law to be submitted upon the hearing of this petition, we will discuss the jurisdiction of this Court over tax liens and demonstrate beyond cavil that the judicial power to deal with them is limited in several very material respects. The cases are clear that the attempt to exercise such jurisdiction must be accompanied either by specific notice of such attempt, under mandate of the Court, directed to the taxing authority involved or by its voluntary submission to the jurisdiction of the Court. Neither of these events occurred in this proceeding. The City of New York maintains that

it had a right to rely upon the sovereign, paramount and prior nature of its liens and that these liens remain today in full force and effect. Any other construction would be an unauthorized and illegal invasion of States' rights and clearly unconstitutional.

43. Finally, assuming *arguendo* that the failure of the City of New York to comply with the provisions of Order No. 32 could bar the City of New York from asserting the validity of its tax liens, we maintain that the course of conduct of the Trustees and their counsel during the reorganization proceedings in their negotiations with the City of New York created an estoppel. This contention is strengthened by the fact that the consequences of the failure to comply with the provisions of Order No. 32 could have been effectively avoided *during* the reorganization proceeding by the application by the City of New York, by way of order for cause shown, for permission to file its claim as provided for in § 77(c)(7) of the Bankruptcy Act.

44. Never in any of their dealings with the City of New York did the Trustees or their counsel ever question the [fol. 45] priority of the City's liens or their status. During the course of the reorganization proceedings the City of New York billed the Debtor for current taxes as they became due. Each of these bills contained a column under which was set forth the word "Arrears." The use of the word "Arrears" on tax bills is provided under Administrative Code of the City of New York, § 415 (1)-10.0. Its effect is to put the recipient of the bill, in this case, the Debtor, on notice that taxes, assessments or water charges are in arrears and are due. Every such tax bill also gives notice that the presence of arrears may give rise to enforcement of the City's lien. The Debtor therefore had ample notice of the existence of these assessment liens and of the fact that the City of New York asserted and continued to assert their validity and enforceability. The burden was upon the Trustees if there was any question as to the validity of these assessment liens to put the matter in issue by affirmative action. As a matter of fact, this Court was never at any time asked to pass upon the validity of these liens prior to the consummation of the reorganization proceedings.

45. Never did the Trustees or their counsel indicate to

the City of New York that they considered the City's liens as being affected by the Plan of Reorganization. To the contrary, they affirmatively recognized the City's liens, whenever they had occasion to deal with them, as valid, subsisting and prior obligations which were not affected by the reorganization proceedings. This conduct lulled the City of New York into a belief that all its assessments would be similarly affirmed and either paid or assumed by the reorganized company. At this late date, the reorganization proceeding being completed and the property of the Debtor returned to it as reorganized, it is extremely doubtful whether this Court could entertain an application by order [fol. 46] to show cause for permission to file the City's claims for the assessments herein. We have reached this position in reliance upon the acts of the Trustees. The petitioner should not be allowed to benefit thereby.

Wherefore, deponent respectfully prays as follows:

1. That the petition herein be dismissed for want of jurisdiction in this Court, or, in the alternative,

2a. That this Court construe the Plan of Reorganization and the Consummation Order and Final Decree as requiring the payment or assumption of all of the assessments set forth in Exhibit A attached to the petition herein, and

2b. That an order be entered herein dismissing the petition, and

3. That the Respondent City of New York be granted such other and further relief as may be justified in the premises.

Meyer Scheps.

(Sworn to on December 14, 1950)

[fol. 47] In United States District Court

Order No. 32 Determining and Fixing the Time and Manner of Filing Claims—January 4, 1936

Pursuant to the mandatory provisions of subdivision (c), paragraph (7), of amendatory Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy requiring

the Court to determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, and the manner in which such claims may be filed or evidenced and allowed, it is ordered:

1. That the 1st day of May, 1936 be, and it hereby is, fixed as the reasonable time within which the claims of creditors of The New York, New Haven and Hartford Railroad Company, Debtor, including claimants in tort whose claims accrued prior to October 23, 1935, may be filed or evidenced and after which no claim not so filed or evidenced may participate, provided, however, that claims arising out of the Debtor's rejection of a contract after April 1st, 1936, may be filed within thirty days after notice of such rejection is given.

2. That each claim shall be filed in duplicate with G. T. Carmichael, Comptroller of the Debtor, 71 Meadow Street, New Haven, Connecticut, who is hereby directed immedi-[fol. 48] ately to stamp the date of receipt thereon and acknowledge receipt of the same.

3. That each claim shall set forth the name and address of the claimant, the nature of the claim, dates of accrual and the amounts of the various items, with such details as shall definitely advise the Debtor of the particulars thereof and distinguish the claim from other claims of like nature, and shall state whether suit is pending on such claim, and if so, the name of the Court in which pending, also whether judgment has been recovered thereon, and shall describe any security for such claim, partial payments, offsets or counterclaims due the Debtor, and if any lien, priority, or preferential classification is claimed, the facts respecting the same shall be fully stated. The Debtor shall promptly examine each such claim, and if it finds the same correct and undisputed, it shall so advise the claimant; if any claim is undisputed in whole or in part, the Debtor shall promptly move in the premises by answer or otherwise and bring the same to the attention of the Court for hearing or reference.

4. That the trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the estate of the Debtor, or against any portion thereof, may, within the time

hereby prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf.

5. That the Debtor hereby is directed to give notice of the foregoing numbered paragraphs of this order to its creditors by promptly causing publication of a notice, containing said paragraphs and directed to such creditors, to [fol. 49] be made once during each week for two consecutive weeks in the New Haven Journal Courier and in the Hartford Courant, newspapers published in the State of Connecticut, and in the Boston Herald, a newspaper published in the State of Massachusetts, and in the Wall Street Journal, a newspaper published in the City of New York, State of New York, and in the Providence Journal, a newspaper published in the City of Providence, State of Rhode Island, and the Debtor is further directed to mail copies of this order to its mortgage trustees or their counsel and to such others as have entered their appearances herein.

When such publication and mailing have been completed, the Debtor shall file with the Clerk of this Court its report with respect thereto.

Enter:

Carroll C. Hincks, District Judge.

Dated: January 4th, 1936.

[fol. 50] IN UNITED STATES DISTRICT COURT

ORDER NO. 1 APPROVING PETITION—October 23, 1935

Upon due consideration of the petition of The New York, New Haven and Hartford Railroad Company, the above named Debtor, verified October 23, 1935, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization in accordance with Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy, and the

Court being satisfied that such petition complies with said section and has been filed in good faith, it is Ordered:

(1) That said petition be, and it hereby is approved as properly filed under Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy.

(2) That the Debtor be, and it hereby is authorized and directed, pending further order of this Court, to run, manage, maintain, operate and keep in proper condition and repair the railroad and properties of the Debtor, wherever situated, whether in this state, judicial circuit, or elsewhere; to manage, operate and conduct its business, and to this end to exercise its authority, rights and franchises and to discharge its public duties; to employ or discharge and to fix the compensation of all its officers, counsel, attorneys, managers, superintendents, agents and employees; to collect and receive the income, rents, revenues, tolls, issues and profits, accrued or to accrue, from its railroad and properties; to collect all its outstanding accounts, and all dividends [fol. 51] and interest on securities belonging to it; to sell, convey, or lease property, real or personal, not needed in the operation of its railroad, and to exercise such rights of sale, conveyance, exchange and release as are reserved to, or available to it under its outstanding deeds of trust, mortgages, trust indentures, and similar instruments, and to use the proceeds of sale of released property as provided in such instruments, all in the same manner that it would be entitled to do in its own right; and, to the extent necessary to protect, preserve or benefit its railroad or properties or business, to make and pay for additions and betterments thereto and therof; all of the foregoing powers to be exercised by Debtor according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

(3) That the Debtor is authorized in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the properties, income, franchises or business of the Debtor;

(b) All necessary current expenses in operating the railroad, preserving the assets, and conducting the

business of the Debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the Debtor; the payment of freight, ticket, switching, car mileage, per diem, switching reclaims, divisions, and all other interline accounts and balances; the adjustment, compromise or payment of claims for loss, damage or delay to freight, for overcharges and for reparation; the payment of joint facility and equipment rental and expenses, and the payment of accounts for materials and [fol. 52] supplies, also all sums now or which may hereafter become due to other persons or corporations for car or equipment repairs, or for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges, interlocking plants and other railroad facilities, and such sums as may be necessary to comply with the obligations of the Debtor under contracts or leases by virtue of which such occupation or use may now or hereafter be enjoyed; but such payments shall not constitute affirmations of such contracts or leases, or any of them.

(c) Liabilities due and unpaid which were incurred by the Debtor within six months preceding the date of this Order in the usual and customary operation of its railroad and properties and the conduct of its business for wages, salaries, fees and similar charges, and for material, supplies and equipment.

(d) Pending further order of the Court the Debtor also is authorized in its discretion to adjust, compromise, make advances for, pay or reimburse others for: claims for or arising out of loss, damage or delay to freight or baggage; overcharges; reparation, adjustments of or refunds for freight or other charges on shipments in connection with which there are transit or storage privileges; freight, ticket, switching, car mileage, per diem switching reclaims and all other interline accounts and balances; rental of equipment or rental of or expense arising from use or operation or of over joint or other facilities; outstanding checks for wages fees or services; claims for personal injuries

to employees which are preferred under the acts of Congress relating to bankruptcy; and other claims, charges or adjustments of similar character between Debtor and other carriers in the conduct of their joint [fol. 53] business, between Debtor and its patrons and between Debtor and its employees; all regardless of when accrued.

(c) The cost of maintaining the corporate existence of the Debtor, including corporate, franchise, stamp and similar taxes, the necessary expense of keeping and preserving its corporate records, of maintaining transfer offices and agents, of registering and transferring its securities and of paying the proper charges and expenses of the trustees under indentures or mortgages pursuant to which securities of the Debtor have been issued.

(f) All payments due from time to time on existing pension systems, and all group insurance carried in whole or in part by the Debtor.

(g) Court costs and costs incurred before various state and federal Commissions or other administrative boards or tribunals.

(h) The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this case, in sufficient quantities to provide copies thereof for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause, and others who may have a substantial interest therein; such expense to be taxed as costs in this case.

(4) That the Debtor, in its discretion, at any time prior to April 23, 1936, or prior to such other day as may be provided by further order of this Court, may disaffirm any of its existing contracts or leases. The disaffirmance of any such contract or lease shall be effective when notice of such disaffirmance, together with proof of service or mailing of a copy or copies thereof by registered mail to the [fol. 54] other party or parties to such lease or contract, shall be filed of record in this proceeding. The performance by Debtor of any such contract or lease within said period or future periods allowed for disaffirmance thereof shall not constitute or be evidence of the adoption or as-

sumption of such contract or lease by Debtor or the waiver by it of its right to disaffirm the same.

(5) That pending further order of the Court in the premises the Debtor is authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights, and to make settlement of any thereof; and likewise to defend or to liquidate by written agreement or consent judgment, decree, order or award any claim, demand or cause of action whether or not suit or other proceeding to enforce the same has been or shall be brought in any court or before any officer, department, commission, board or tribunal, but no payments shall be made by the Debtor in respect of any such claims accruing prior to the date of this order, or in respect of any actions, proceedings, or suits on such claims, without further order or direction of this Court, except such as may be permitted by this or other orders hereafter entered herein, and such as constitute preferred claims under the acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the Debtor that otherwise would not exist.

(6) The Debtor shall close its present books of account at midnight on October 23, 1935. The Debtor shall open new books of account at the beginning of the day of [fol. 55] October 24, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor and shall preserve proper vouchers or receipts for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected and approved by this Court.

(7) That, not later than November 30, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on October 23, 1935, and, within forty-five days after

the close of each calendar month thereafter, shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(8) That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the Debtor, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business [fol. 56] by the Debtor under the orders of this Court, or from commencing or continuing any suits against the Debtor wherein any bond, except a bond for costs, may be required of the Debtor herein, either during the pendency of said proceedings or of subsequent proceedings therein by appeal or otherwise: Provided, that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.

(9) That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the Debtor as security for its notes or obligations be and each of them hereby is restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

(10) That the Debtor hereby is directed to give notice by mailing a copy of this Order to its mortgage trustees, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date of the entry of this Order once in The New Haven Journal Courier, a newspaper published in the City of New Haven,

and in The Hartford Daily Courant, a newspaper published in the City of Hartford, State of Connecticut, and in The Boston Herald, a newspaper published in the City of Boston, State of Massachusetts, and in The Wall Street Journal, a newspaper published in the City of New York, State of New York, and in The Providence Journal, a newspaper published in the City of Providence, State of Rhode Island, of a hearing to be held on November 6, 1935, at twelve o'clock noon, in the Court Room occupied by this Court in the United States Court House, New Haven, Connecticut, [fol. 57] at which hearing, or any adjournment thereof, this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof, and marked "Exhibit A".

(11) This Court reserves full right and jurisdiction to enter at any time such further orders in the premises as the Court may deem proper, including the right to amend, extend, limit, modify, or otherwise change or rescind the present order.

When such mailing and publication has been completed the Debtor shall file with the Clerk of this Court its report with respect thereto.

Enter:

Carroll C. Hincks, District Judge.

Dated: October 23, 1935.

"Exhibit A," Annexed to Order No. 1

Notice to All Creditors
and Stockholders

of

The New York, New Haven and
Hartford Railroad Company

Pursuant to an order entered October 23, 1935, by the Honorable Carroll C. Hincks, Judge of the District Court of the United States for the District of Connecticut, notice is hereby given that a hearing will be held on November [fol. 58] 6, 1935, at twelve o'clock noon, by said Judge,

the courtroom usually occupied by him in the United States Court House, New Haven, Connecticut, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act entitled: "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereto, and supplementary thereto, appoint one or more trustees of the property of said The New York, New Haven and Hartford Railroad Company.

The New York, New Haven and Hartford Railroad Company.

Dated at New Haven, Connecticut, October 23, 1935.

[fol. 59] In United States District Court

Extract from Page 7980 of Record, Referred To in Affidavit

The plan should also provide for the satisfaction of (a) current liabilities of the principal debtor incurred in the ordinary conduct of its business prior to the institution of the reorganization proceeding which are entitled to priority over any mortgages of the pri' pal debtor, (b) current liabilities and obligations of the bankruptcy trustees incurred during the reorganization proceeding, (c) expenses of reorganization allowed by the court within the maximum fixed by us, and (d) claims for interest and principal not paid at maturity because not presented for payment. To the extent that such claims, liabilities, or obligations are not paid by the principal debtor or the bankruptcy trustee pursuant to order of the court in the reorganization proceeding, they should be paid in cash or assumed by the reorganized company, provided that any amounts so assumed should constitute a charge upon the reorganized company with the same priority over its other obligations, as they would be entitled to in the reorganization proceedings. The plan also should provide that all such claims, liabilities, and obligations may be adjusted or compromised and dealt with or paid or discharged by the reorganized company, all as may be determined by the board of directors of the reor-

ganized company, subject to the approval of the court. We find that such claims against the principal debtor, when so treated, are not materially and adversely affected by the plan.

[fol. 60] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MEYER SCHEPS, SWORN TO ON JANUARY 10, 1951, IN OPPOSITION TO PETITION

STATE OF NEW YORK,
County of New York, ss.:

Meyer Scheps, being duly sworn, deposes and says:

1. I am an Associate Assistant Corporation Counsel of the City of New York, fully familiar with all of the matters hereinafter set forth, who argued in opposition to the petition of the New York, New Haven and Hartford Railroad Company before this Court on January 2, 1951.

2. This affidavit is made for the purpose of placing in the record and more particularly referring to certain filed papers adverted to by your deponent on the argument of the aforesaid petition and also mentioned in the memorandum submitted to the Court at that time.

3. Deponent referred to Order No. 736 in the above proceeding dated March 13, 1944. This Order classified creditors and stockholders in thirteen different classes.

4. Deponent further referred to Order No. 822 in this proceeding dated September 6, 1945. The paper referred to was the decree confirming the Plan of Reorganization.

5. Deponent further, upon the argument, adverted to the list of stockholders and creditors directed to be filed by [fol. 61] this Court pursuant to Order No. 736, aforesaid, as amended by Order No. 736-A, entered April 11, 1944. This list of *known* stockholders and creditors of the Debtor was submitted over the signature of H. J. Wells, Esq., attorney for the Trustees. The attention of the Court is called to the fact that nowhere on the said lists does the City of New York appear as a *known* creditor. Indeed the

City of New York does not appear on the said lists under any designation.

6. All of the foregoing papers are adverted to as though more fully set forth herein and are intended to be a part of the record of this application.

(Sworn to by Meyer Scheps on January 10, 1951.)

IN UNITED STATES DISTRICT COURT

ORDER NO. 736 CLASSIFYING CREDITORS AND STOCKHOLDERS—March 13, 1944

This matter having come on for hearing which was duly noticed pursuant to Order No. 699, entered herein on July 29, 1943; and the Interstate Commerce Commission having found and the Court having affirmed such finding in a decree [fol. 62] designated as Order No. 734, entered herein on March 6, 1944, that the equities of the stockholders of the Principal Debtor and of Old Colony Railroad Company have no value and that the interests of certain creditors will not be adversely and materially affected by the plan of reorganization pending herein or that such plan provides for the payment in cash of the claims of such creditors; and it further appearing to the Court that all parties in interest have been heard or given opportunity to be heard; and the Court being duly advised in the premises, it is Ordered:

I

That for the purposes of the pending plan of reorganization and its acceptance, the creditors and stockholders herein, to whom submission of said plan is required, are divided into the following classes according to the nature of their respective claims and interests:

Class 1.

All holders (not otherwise classified) of The Housatonic Railroad Company Five Per Cent. Fifty Year Consolidated Mortgage Gold Bonds due November 1, 1937.

Class 2.

All holders (not otherwise classified) of The New England Railroad Company Four and Five Per Cent. Fifty Year Consolidated Mortgage Gold Bonds due July 1, 1945.

Class 3.

All holders (not otherwise classified) of Danbury and Norwalk Railroad Company Four Per Cent. Fifty Year First Refunding Mortgage Gold Bonds due June 1, 1955.

[fol. 63] Class 4.

All holders (not otherwise classified) of Boston and New York Air Line Railroad Company Four Per Cent. First Mortgage Gold Bonds due August 1, 1955.

Class 5.

All holders (not otherwise classified) of New Haven and Northampton Company Four Per Cent. Fifty Year Refunding Consolidated Mortgage Gold Bonds due June 1, 1956.

Class 6.

All holders (not otherwise classified) of Central New England Railway Company Four Per Cent. Fifty Year First Mortgage Gold Bonds due January 1, 1961, including the National Rockland Bank (Boston) to the extent that said bank holds said bonds in pledge.

Class 7.

All holders (not otherwise classified) of the following debentures and bonds secured by the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad Company to Bankers Trust Company, Trustee, dated December 9, 1920, as amended and supplemented:

The New York, New Haven and Hartford Railroad Company Series of 1927 Four and one-half Per Cent. First and Refunding Mortgage Bonds due December 1, 1967;

The New York, New Haven and Hartford Railroad Company Four Per Cent. Debentures due March 1, 1947;

The New York, New Haven and Hartford Railroad Company Three and one-half Per Cent. Debentures due March 1, 1947;

[fol. 64] The New York, New Haven and Hartford Railroad Company Six Per Cent. Debentures due January 15, 1948;

The New York, New Haven and Hartford Railroad Company Three and one-half Per Cent. Debentures due April 1, 1954;

The New York, New Haven and Hartford Railroad Company Four Per Cent. Debentures due July 1, 1955;

The New York, New Haven and Hartford Railroad Company Three and one-half Per Cent. Debentures due January 1, 1956;

The New York, New Haven and Hartford Railroad Company Four Per Cent. Debentures due May 1, 1956;

Consolidated Railway Company Four Per Cent. Debentures due July 1, 1954;

Consolidated Railway Company Four Per Cent. Debentures due January 1, 1955;

Consolidated Railway Company Four Per Cent. Debentures due April 1, 1955;

Consolidated Railway Company Four Per Cent. Debentures due January 1, 1956;

The National Rockland Bank (Boston) and Rhode Island Hospital National Bank (Providence) to the extent that each said Bank holds in pledge First and Refunding Six Per Cent. Bonds due July 1, 1972.

Class 8.

All holders (not otherwise classified) of The New York, New Haven and Hartford Railroad Company Six Per Cent. Fifteen Year Secured Gold Bonds due April 1, 1940.

Class 9.

The following holders of The New York, New Haven and Hartford Railroad Company short term collateral promissory notes secured by pledge of collateral:

[fol. 65] Railroad Credit Corporation,
Reconstruction Finance Corporation.

Class 10.

All holders (whether as pledgees or otherwise) of the following bonds of Old Colony Railroad Company issued

under and/or secured by the First Mortgage of Old Colony Railroad Company to Old Colony Trust Company, Trustee, dated January 30, 1924, as supplemented;

Old Colony Railroad Company Four Per Cent. Bonds due January 1, 1938;

Old Colony Railroad Company First Mortgage Bonds, Series A, Five and one-half Per Cent. due February 1, 1944;

Old Colony Railroad Company First Mortgage Bonds, Series B, Five Per Cent. due December 1, 1945;

Old Colony Railroad Company First Mortgage Bonds, Series C, Four and one-half Per Cent. due July 1, 1950;

Old Colony Railroad Company First Mortgage Bonds, Series D, Six Per Cent. due July 1, 1952;

Old Colony Railroad Company First Mortgage Bonds, Series E, Six Per Cent. due September 1, 1953.

Class 11.

All holders of stock of Providence, Warren & Bristol Railroad Company which is outstanding in the hands of the public in the aggregate amount of 449 shares.

Class 12.

All holders of stock of Providence, Warren & Bristol Western Railroad Company which is outstanding in the hands of the public in an aggregate amount of 3,382 shares.

[fol. 66] Class 13.

All other creditors of the debtors herein who are affected by the plan, excepting the Trustees of the properties of said debtors and of the Boston and Providence Railroad Corporation.

II

That within sixty (60) days from the date of this order, unless such time is subsequently extended by further order herein, the Clerk of this Court shall transmit to the Interstate Commerce Commission lists of all known stockholders and creditors of the debtors herein included in any of the foregoing classes, such lists to show the amounts and character of their debts, claims and securities, and the last known post-office address or place of business of each such

stockholder or creditor, and the debtors' trustees within said time shall file said lists herein.

Enter:

C. C. Hincks, District Judge.

Dated: March 13, 1944.

[fol. 67] In United States District Court

Order No. 736A Extending Time to File and Transmit Lists of Stockholders and Creditors—April 11, 1944

Upon the oral motion of the Trustees of the properties of the several debtors herein, and the Court being duly advised in the premises, it is ordered:

That the time heretofore fixed by section II of Order No. 736, entered herein on March 13, 1944, for filing and transmitting lists of all known stockholders and creditors as therein described be and it hereby is extended to and including June 12, 1944.

Enter:

C. C. Hincks, District Judge.

Dated: April 11, 1944.

[fol. 68] In United States District Court

Order No. 822 Confirming Plan of Reorganization—September 6, 1945

This cause having come on for further hearing pursuant to the order of this Court entered herein on May 25, 1945, for the purpose of determining whether the pending plan of reorganization shall be confirmed; all parties in interest having been given due opportunity to file their objections thereto in writing and having been heard or given opportunity to be heard thereon at a hearing duly noticed pursuant to said order of the Court; the Court having filed its opinion herein on August 31, 1945 and being duly advised in the premises

Finds:

1. That this Court has jurisdiction of the subject matter of these proceedings and of all of the parties in interest, and has jurisdiction of the debtors, The New York, New Haven and Hartford Railroad Company, Principal Debtor, Old Colony Railroad Company, Hartford and Connecticut [fol. 69] Western Railroad Company, Providence, Warren and Bristol Railroad Company, secondary debtors, and their properties, wherever located.

2. That on March 6, 1944, this Court filed an opinion, supplemented on March 15, 1944, approving the plan of reorganization previously approved and certified to it by the Interstate Commerce Commission and entered its Order No. 734 approving said plan. Said plan is contained in the Fifth Supplemental Order of the Commission, dated February 8, 1944, in Finance Docket No. 10992. After the entry of said Order No. 734 and pursuant to a direction therein contained, the Clerk of this Court sent to the Commission certified copies of such opinion and of this Court's opinion dated December 21, 1943 and a certified copy of said Order No. 734.

3. That this Court, pursuant to the appellate mandate of January 30, 1945, entered its Order No. 792 on February 13, 1945 referring said plan back to the Commission in order to give it opportunity to consider further the price to be paid for the property of Old Colony Railroad Company and the provisions of sections N(2) and N(3) of said plan.

4. That in its Sixth Supplemental Report and Order dated May 14, 1945, in Finance Docket No. 10992, a certified copy of which has been filed herein, the Interstate Commerce Commission has given further consideration to the matters required by said mandate and said reference and has affirmed and reiterated its recommendations thereon as contained in its said Fifth Supplemental Report and Order, and that, after hearing, said Sixth Supplemental Report and Order and all evidence received at said hearing have this day by separate order been included as part of the record [fol. 70] of this Court in the proceedings upon a plan, and that said Order No. 734 of this Court, being consistent with the requirements of the appellate opinions of January 2, 1945 and January 23, 1945, and with the appellate mandate

of January 30, 1945, in the light of the record as thus enlarged in all respects as to the Old Colony Railroad Company, has been reinstated as an order of this Court in full force and effect.

5. That on March 13, 1944, this Court entered its Order No. 736 dividing, for the purposes of said plan and its acceptance, the creditors and stockholders of the debtors herein to whom submission of said plan was required into thirteen classes according to the nature of their respective claims and interests, and directing that lists of all known stockholders and creditors included in any of said classes be filed herein and transmitted to the Interstate Commerce Commission, such lists to show the amounts and character of their debts, claims and securities and the last known post-office address or place of business of each such stockholder or creditor.

6. That thereafter, on June 12, 1944, the Trustees of the properties of the debtors filed said lists and on September 18, 1944, filed supplemental lists, and that copies of said lists and supplemental lists were transmitted to the Interstate Commerce Commission for its use in connection with the submission of said plan.

7. That by its order of August 22, 1944, in Finance Docket No. 10992, the Interstate Commerce Commission, Division 4, directed that said plan be submitted for acceptance or rejection to all holders of claims included in said thirteen classes and that such submission be effected by mailing to each such [fol. 71] stockholder, creditor, and claimant shown on the lists filed by said Trustees, and to each stockholder, creditor, and claimant not so listed whose claim against the Principal Debtor or secondary debtors had been allowed and who might request a ballot, a copy of said plan as set forth in the modified order of the Commission of July 13, 1943, approving said plan, as corrected by order dated February 8, 1944; a copy of the Commission's reports of February 18 and March 25, 1941, October 6, 1942, July 13, 1943, and February 8, 1944, with certain appropriate deletions; copies of the opinions of this Court dated December 21, 1943, March 6, 1944, and March 15, 1944, and a copy of Order No. 734 of this Court, dated March 6, 1944, approving said plan; a ballot, in duplicate, for the holders of claims in each of

the classes to be voted; and a statement by the Secretary of the Commission advising such stockholders, creditors or claimants of the approval and submission of the plan, describing the method of voting, and stating the time within which the executed ballots must be returned to the Commission.

8. That on September 26, 1944, the Interstate Commerce Commission, Division 4, duly submitted said plan for acceptance or rejection to the creditors and stockholders in said thirteen classes pursuant to the provisions of Section 77 of the Bankruptcy Act, as amended, notice of such submission being published by said Trustees as required by the Commission and this Court.

9. That by certificate dated December 29, 1944, the Interstate Commerce Commission, Division 4, duly certified to this Court the results of such submission, said certificate showing that ballots were duly cast and counted by the Commission as follows:

[fol. 72]

	Amount for Acceptance	Amount for Rejection	Percentage for Acceptance
Class 1, Holders of The Housatonic Railroad Company Consolidated Mortgage Bonds	$ 635,000	$ 357,000	64.01
Class 2, Holders of The New England Railroad Company Consolidated Mortgage Bonds	9,758,000	628,000	93.95
Class 3, Holders of Danbury and Norwalk Railroad Company First Refunding Mortgage Bonds	108,000	19,000	85.04
Class 4, Holders of Boston and New York Air Line Railroad Company First Mortgage Bonds	1,371,000	11,000	99.20
Class 5, Holders of New Haven and Northampton Company Refunding Consolidated Mortgage Bonds	1,711,000		100
Class 6, Holders of Central New England Railway Company First Mortgage Bonds	7,204,000	102,000	98.60
Class 7, Holders of Debentures and Bonds secured by The First and Refunding Mortgage of the Principal Debtor	62,715,700	2,406,400	96.30
Class 8, Holders of the Six Per Cent. Fifteen-Year Secured Bonds of the Principal Debtor	6,495,414.75	30,258	99.54

[fol. 73]

	Amount for Acceptance	Amount for Rejection	Percentage for Acceptance
Class 9, Reconstruction Finance Corporation and The Railroad Credit Corporation, Holders of secured notes of the Principal Debtor	6,555,953.79		100
Class 10, Holders of bonds issued under and/or secured by the First Mortgage of Old Colony Railroad Company	4,925,000	5,044,000	49.40
Class 11, Holders of the stock of Providence, Warren & Bristol Railroad Company outstanding in the hands of the public	31 shares		100
Class 12, Holders of the stock of Hartford and Connecticut Western Railroad Company outstanding in the hands of the public	720 shares	349 shares	67.35
Class 13, All other creditors of the debtors affected by said plan, excepting the Trustees of the properties of said debtors and of Boston and Providence Railroad Corporation	$11,671,653.72	$2,639,804.19	81.55

10. That this Court is satisfied that said plan has been accepted by or on behalf of creditors of each class to which submission is required by law holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on [fol. 74] said plan (with the exception of the creditors in said Classes 1 and 10), and by or on behalf of stockholders of each class to which submission is required by law holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan, and that such acceptances have not been made or procured by any means forbidden by law.

11. That this Court is satisfied and finds that said plan is predicated upon findings by the Commission which are supported by material evidence and are in accordance with legal standards and on the basis of said findings that said plan makes adequate provision for fair and equitable treatment for the claims of the creditors in said Classes 1 and 10, and that the rejection by such Classes is not reasonably justified in the light of the respective rights and interests

of the rejecting creditors in said Classes and all the relevant facts herein.

12. That this Court, pursuant to said appellate mandate of January 30, 1945, has heard the claims in administration of Rhode Island Hospital National Bank of Providence, of The President and Directors of the Manhattan Company, and of Merchants National Bank of Boston; that to the extent that the final disposition of such claims may be inconsistent with the provisions of subsections (14), (15) and (16) of Section J of said plan, this Court has the power under said plan to reconcile any such inconsistency; and that any such reconcilation would not materially affect any other provisions of said plan.

13. That in view of the provision of subsection (4) of Section N of said plan for the assumption and payment by the reorganized company of current liabilities and obligations of the Old Colony Trustees incurred during the reorganization proceedings, the final disposition of claims in administration filed herein on June 15, 1945 by The First [fol. 75] National Bank of Boston, The Chase National Bank of the City of New York, and The National Shawmut Bank of Boston will not materially affect any provisions of said plan.

14. That said plan conforms in all respects to the requirements of clauses (1) to (3), inclusive, of the first paragraph of subsection (e) of Section 77 of the Bankruptcy Act, as amended, and should be confirmed.

15. The foregoing findings shall be taken and deemed to be findings of fact and in addition, to the extent appropriate, conclusions of law.

It is therefore Ordered, adjudged and decreed:

I

That all objections heretofore filed herein to the confirmation of the plan of reorganization of the several debtors herein as contained in said Fifth Supplemental Order of the Commission dated February 8, 1944, which Fifth Supplemental Order is hereby made a part hereof by reference, be and they hereby are severally overruled and denied.

II

That said plan of reorganization of the several debtors herein be and it hereby is confirmed.

III

That the provisions of said plan of reorganization and of this order, subject to the right of judicial review, shall henceforth be binding upon the several debtors herein, all stockholders thereof, including those who have not, as well as those who have, accepted said plan, and all creditors secured or unsecured, whether or not adversely affected by said plan, and whether or not their claims have been filed. [fol. 76] and, if filed, whether or not approved herein, including creditors who have not, as well as those who have, accepted said plan.

IV

That the several debtors herein and any other corporation or corporations organized or to be organized for the purpose of carrying out said plan of reorganization be and each of them hereby is authorized and directed and shall have full power and authority to put into effect and carry out said plan and the orders of this Court relative thereto, under, and subject to the supervision and control of this Court, the laws of any State or the decision or order of any State authority to the contrary notwithstanding; provided, however, that no action taken by any of said debtors or such other corporation or corporations or any other person shall have any definitive, final or binding effect as a complete or partial effectuation of said plan unless or until a further order of this Court shall so provide.

V

That the property dealt with by said plan of reorganization, when transferred and conveyed to the reorganized company pursuant to said plan, shall be free and clear of all claims of the several debtors herein, their stockholders and creditors, and free and clear of all liens and other encumbrances, except as provided in said plan and in this order and except as may consistently with the provisions of said plan be reserved in any future order of this Court

directing such transfer and conveyance, and upon such transfer and conveyance and the assumption by the reorganized company of all debts and liabilities to be assumed under said plan or any order of this Court, the several debtors herein shall be discharged from all their debts and liabilities.

[fol. 77]

VI

That the rights and interests of all creditors and stockholders of the several debtors herein with respect to claims and securities affected by said plan of reorganization shall be only those provided by said plan as evidenced by and specified in the instruments executed pursuant thereto with the approval of this Court.

VII

That jurisdiction of these proceedings and of all parties in interest is hereby retained for the purpose of entering such other and further orders as this Court may determine to be necessary.

Enter:

C. C. Hincks, District Judge.

Dated: September 6th, 1945.

In United States District Court

Submission of Lists of Stockholders and Creditors—June 10, 1944

Pursuant to section II of Order No. 736, entered herein on March 13, 1944, as amended by Order No. 736-A, entered herein on April 11, 1944, Howard S. Palmer, James Lee [fol. 78] Loomis and Henry B. Sawyer, as the Trustees of the properties of the several debtors, by their attorney, herewith file lists of all known stockholders and creditors of the debtors herein included in all of the classes specified in said Order No. 736.

Upon the entry of said Order No. 736, the Trustees promptly took steps to obtain as complete and accurate

lists as were reasonably possible. To that end, approximately ten thousand cards were mailed to all those known or believed to be bondholders, a large number of banks and brokerage houses were circularized, and information was requested from various protective committees, mortgage trustees, paying agents and others. In addition, the Trustees had access to all stock registers and all lists of registered bondholders. And when it appeared that these efforts might not produce adequate results, advertisements for information were inserted in seventeen leading newspapers throughout the country.

The lists are arranged according to the classes enumerated in Order No. 736. In two instances more securities are listed than are actually outstanding. The attempt has been made to eliminate duplications, but adequate information has not been received to remove all of them or to keep abreast of all transfers of securities.

The lists are submitted with the understanding that their contents do not constitute admissions by any of the debtors or the Trustees in the proceedings herein or otherwise.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees as Aforesaid, (S.) by H. J. Wells, Their Attorney.

Dated: June 10, 1944.

[fol. 79] In United States Court of Appeals for the Second Circuit

[Title omitted]

Stipulation as to Lists of Stockholders and Creditors

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the name of the City of New York is not contained in the lists of stockholders and creditors submitted to the United States District Court, District of Connecticut, on June 10, 1944, by the Debtor, pursuant to Section II of Order No. 736,

entered herein on March 13, 1944, as amended by Order No. 736-A, entered herein on April 11, 1944.

Dated: November 8, 1951.

Denis M. Hurley, Corporation Counsel, Attorney for the City of New York, Appellant; E. R. Brumley, Attorney for the New York, New Haven and Hartford Railroad, Debtor.

(Lists omitted pursuant to stipulation printed herein at p. 117.)

[fol. 80] In United States District Court

[Title omitted]

Order Appointing Trustees—November 8, 1935

The matter of the appointment of one or more trustees of the Debtor's property, pursuant to the requirements of the amendment of August 27, 1935 to Section 77 of the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States", as amended, having come on for hearing on November 6, 1935, and it appearing to the Court that the Debtor has given notice of this hearing as directed in its Order No. 1 of October 23, 1935, and the Court having heard the recommendations of counsel representing the Debtor and certain insurance companies and savings banks as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the [fol. 81] continuity of operations by the corporate organization of the Debtor and should be at minimum cost to the Debtor, and that the appointment of three trustees would best serve the interests of all parties in interest, it. is Ordered:

1. That Howard S. Palmer, President of the Debtor, of New Haven, W. M. Daniels, of New Haven, and James Lee Loomis of Granby, both of those later named being persons who within one year prior to the date of this order have not been officers, directors, or employees, of the Debtor, any subsidiary corporation, or any holding company con-

nected therewith, be and they hereby are appointed Trustees of the Debtor's property.

2. That the bond of each of said Trustees be and it hereby is fixed at $50,000.00, conditioned to the effect that he will well and truly perform the duties of a Trustee of the Debtor's property and duly account for any moneys and properties which may come into his hands, and abide by and perform all things which he shall be directed by the Court to do.

3. That these appointments shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern.

5. That said Trustees shall have, following said ratification and upon filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said amendatory Section 77, all of the powers of a trustee appointed pursuant to Section 44 of [fol. 82] said Act or any other section of said Act, and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in an equity proceeding, and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the Debtor.

6. That, following said ratification and upon the filing of such bonds, all of the property, real, personal and mixed, of every kind and nature whatsoever, of the Debtor shall by this order be vested in said Howard S. Palmer, W. M. Daniels and said James Lee Loomis, as Trustees of the Debtor's property.

7. That said Trustees shall have, following said ratification and upon filing such bonds, all the rights, privileges, powers and duties heretofore granted to or imposed upon the Debtor pursuant to said Order No. 1 of this Court and all orders supplementary thereto and amendatory thereof, and each and all of the orders heretofore entered in this proceeding shall with respect to said Trustees and the property of the Debtor, be of like force and effect as

though said Trustees were therein specifically named in the place of the Debtor, all of said orders being hereby incorporated in and made a part of this order by reference.

8. That, following said ratification and upon filing such bonds, said Trustees shall by this order have authority and power to designate employees of the Debtor to execute and deliver, in their stead and as their agents, checks, drafts, vouchers, orders, contracts, deeds, leases, easements, and any and all instruments of every kind and nature whatsoever, incidental to the operation of the property of the Debtor, and that such instruments, so executed by the agents of said Trustees, shall bind said Trustees the same as [fol. 83] though their signatures had been affixed thereto.

9. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise changing this order, and in all respects to regulate and control the conduct of said Trustees.

10. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of November 6, 1935, to the end that said Interstate Commerce Commission may determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

Enter:

Carroll C. Hincks, District Judge.

Dated: November 8th, 1935.

A true copy. Attest: C. E. Pickett, Clerk, U. S. District Court, Conn. (Seal.)

[fol. 84] IN UNITED STATES DISTRICT COURT

EXTRACTS FROM ORDER NO. 1007

Section II, Subdivision 3

3. *Transfer and Discharge.* Upon the consummation date:

(i) all the business and affairs and the entire property and estate of the Debtor and the Secondary Debtors of every name and nature and all right, title and interest of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the property of Debtor and the Secondary Debtors (herein called the "Bankruptcy Trustees"), the Certificate of Amendments having first been filed in the Office of the Secretary of State of the State of Connecticut, shall vest in and become the absolute property of the Reorganized Company, free and clear of all claims, rights, demands, interest, liens, encumbrances of creditors or other obligees of the Debtor, or of the Secondary Debtors, or their properties, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company and of all rights and claims of the holders of shares of the capital stock of the Debtor and the Secondary Debtors;

(ii) the Debtor and the Secondary Debtors shall be discharged and released forever from all of their obligations, debts and liabilities, whether or not presented or allowed in these proceedings, including, without limitations, all claims made, assumed or guaranteed by the Debtor or the Secondary Debtors or enforceable against their property, except such claims as are to be paid or assumed by the Reorganized Company in accord with the Plan;

[fol. 85] (iii) all mortgages, bonds, notes, certificates and shares of stock and all other securities, leases, obligations, debts and liabilities without limitation as to their nature, whether made or assumed or guaranteed by the Debtor or the Secondary Debtors or enforceable against them or their property, shall become void and unenforceable against the Reorganized Company or its

successors or their property, save for such securities, leases, obligations, debts and liabilities as are to be paid or assumed by the Reorganized Company as hereinafter provided.

Nothing in this Section 3 of Subdivision II and nothing elsewhere in this order shall in any way affect or impair the rights of the holders of claims against and obligations of the Debtor and Secondary Debtors to be satisfied, paid or assumed as hereinafter provided.

Section VIII, Subdivision 1

Assumption of Obligations

1. *Obligations Assumed.* (a) On the consummation date, the Reorganized Company shall assume the obligations of the Bankruptcy Trustees or their predecessors in interest referred to in the instruments numbered as items (14) through (30) in Section 1 of Subdivision III of this order and to the extent provided in such instruments.

(b) The obligations of the Debtor under the bonds, indentures, guaranties and leases referred to in the instruments numbered as items (31) through (37) in Section 1 of Subdivision III of this order, shall continue unaffected and unimpaired by the Plan.

[fol. 86] (c) The Reorganized Company shall pay in cash, or assume, without further order of this Court, all claims insofar as not paid prior to the consummation date in respect of the following:

(i) All taxes justly due the United States from the Debtor and the Secondary Debtors.

(ii) The reorganization expenses of the Debtor and the Secondary Debtors.

(iii) Claims accruing as a part of the cost of the administration of the properties of the Debtor and the Secondary Debtors.

(iv) Any and all taxes due from the Old Colony Railroad Company, to the Commonwealth of Massachusetts and any city, town or other political subdivision thereof.

(v) All claims against the Old Colony Railroad Company classified as payable in preference to the

claims of the holders of bonds secured by mortgages on the property of the Old Colony Railroad Company.

(vi) The amounts due on any interest coupons, on the bonds made, assumed or guaranteed by the Debtor, which were payable but were not paid prior to October 23, 1935 upon presentation of such coupons for payment.

(vii) All executory contracts of the Debtor and Secondary Debtors and of the Bankruptcy Trustees not disaffirmed or dealt with in the Plan.

Provided, however, that the Reorganized Company may contest the amount and validity of any claim or obligation described in items (i) through (vi) of this paragraph (c).

[fol. 87]

Section XI

Injunction and Reservation of Jurisdiction

1. *Injunction.* All persons, firms and corporations, wherever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suit or proceeding at law or in equity or otherwise, against the Reorganized Company, or its successors and assigns, or any of the assets of property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor or the Secondary Debtors, or any of its assets or properties, and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal or mixed, of any kind or character, on or at any time after the consummation date in the possession of the Reorganized Company, and from interfering with or taking steps to interfere with the Reorganized Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of the Reorganized Company, by reason of or on account of any obligation or obligations incurred by the Debtor or the Secondary Debtors or any of the Trustees in this proceed-

ing, except the obligations imposed on the Reorganized Company by this order; and all such persons, firms and corporations are also hereby restrained and enjoined from instituting, prosecuting or pursuing any suit or proceeding, at law or in equity or otherwise, against the Committee, or any of them, or against the Bankruptcy Trustees or against the Reorganized Company, or against any public officer, or [fol. 88] against any of said fiduciaries, for the purpose of preventing or delaying the consummation of the Plan or of this order.

2. *Reservation of Jurisdiction.* The Court hereby reserves jurisdiction in respect of the following matters:

(a) To examine and approve the final statement of account of the Bankruptcy Trustees for the period subsequent to June 30, 1947.

(b) To consider and pass upon the allowances to be made for compensation for the services rendered and expenses incurred by various parties to this proceeding and for counsel to the Committee.

(c) To pass on the final report of the Committee.

(d) To consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with this order and to construe the Plan as to matters which may require construction, not dealt with in this order.

(e) To consider and act in the matter of the proof of the claim of Irving Trust Company under item (vi) of paragraph (b) of Section 1 in Subdivision IX of this order.

(f) To consider and act in the matter of the proof of any claim against the Debtor which shall have been filed or for which provision shall have been made in the Plan as of the date of this order but the amount of which shall not have then been fixed.

(g) To consider and act in the matter of the reservation of the shares of Common Stock of the Reorganized Company in so far as necessary to provide for any [fol. 89] claim, including the claim of the Secured Sixes for the difference above mentioned, the amount of which has not been fixed as of the date of this order.

(h) To consider and act in the matter of directing

the sale of any of the Common Stock of the Reorganized Company which is not required for the satisfaction of the claims of unsecured creditors.

(i) To give instructions and directions to the Bankruptcy Trustees with respect to matters within the scope of their authority.

(j) To consider and act in the matter of the allowance of any and all claims arising out of the administration of the property of the Debtors and the Secondary Debtors.

(k) To consider and act in the matter of the disposition of the funds on hand with the Merchants National Bank of Boston consisting of interest paid on the New York, New Haven and Hartford Railroad Company First and Refunding Mortgage Bonds, Series E, held by Old Colony Railroad Company.

(l) To consider and act in any matter arising out of the option granted in the Plan to the Commonwealth of Massachusetts, for the purchase of the so-called "Boston Group Lines".

(m) To consider and act on any question respecting the "Critical Figures" established by the Plan with respect to the termination by the Reorganized Company of passenger service on the Old Colony Lines.

(n) To hear and determine any question arising as to the amount or legality of any tax claimed to be due [fol. 90] and owing to the United States from the Debtor or the Secondary Debtors or the Trustees in Bankruptcy or any of them for any taxable period subsequent to October 23, 1935 and prior to the entry of this order.

(o) To consider and act on any questions respecting claims between the Reorganized Company and the Boston and Providence Railroad Corporation or its Trustee arising out of the provisions of the Plan herein relating to the Boston and Providence Railroad Company or arising out of the operation of the lines of the Boston and Providence by the Bankruptcy Trustees or the Reorganized Company.

(p) To take such further action as may be necessary on account of or to carry out order No. 899 herein.

(q) To take such further action as may be necessary to put into effect and carry out this order and the Plan and all other orders relative thereto heretofore entered by this Court, *provided, however*, that nothing in this Section 2 shall be construed as a reservation of jurisdiction to change the Plan or any of the rights vested thereunder or any of the rights of the holders of the new securities of persons entitled to receive them.

2. Termination of Jurisdiction. Except as provided in Section 2 of this Subdivision XI hereinabove, all jurisdiction of this Court in or by virtue of these proceedings is hereby, as of the consummation date, wholly terminated and, except only as aforesaid and effective as of the consummation date, this proceeding is hereby closed.

Dated, September 11, 1947.

C. C. Hincks, United States District Judge.

[fol. 91] In United States District Court

Extracts from Plan of Reorganization

L. Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors. All such claims, liabilities, and obligations may be adjusted or compromised and dealt with or paid or discharged by the reorganized company, all as may be determined by the board of directors of the reorganized company subject to the approval of the court. The Bankers Trust Company shall be indemnified against any loss it may incur by reason of the order of July 21, 1942, of the Tax Commission of the State of New York imposing against the series of 1927 bonds, issued under the first and refunding mortgage, mortgage-recording fees and penalties.

The reorganized company shall be deemed to have assumed such of the contracts of the principal debtor which are executory in whole or in part, including any executory leases and liabilities under guaranties but excepting any such obligations which are expressly disaffirmed herein, as shall have been affirmed or shall not have been disaffirmed by the bankruptcy trustees, with the approval or authorization of the court, prior to the date of confirmation of the plan, and also any executory contracts made by the bankruptcy trustees with the approval of the court which, by their terms, do not terminate at or prior to the conclusion of the reorganization proceeding.

The reorganized company shall assume liability for and pay in due course any and all taxes due to the United States from the principal debtor or its trustees, or from the Hart-
[fol. 92] ford & Connecticut Western, the Providence, Warren & Bristol, or their trustees upon the transfer of their properties to the reorganized company, for any taxable period prior to the date of confirmation of the plan without requiring proof thereof in this proceeding and without prejudice by reason of not having been proved herein, subject, however, to the statutes of limitations normally applicable to the assessment and collection of such taxes; provided, however, that the liability of the reorganized company for any taxes which are the subject of litigation on the date of confirmation of the plan, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided, further, that this provision shall not be deemed to preclude either the principal debtor, its trustees, or the reorganized company from contesting the merits of any such tax in the manner provided by law.

N. The reorganized company shall acquire as a part of its reorganization all of the properties, franchises, and assets of the Old Colony except those of the Old Colony's Boston group (those covered in Finance Docket No. 12614) upon the terms and conditions as follows:

* * * * * * *

(4) In consideration of the transfer and conveyance to the reorganized principal debtor of (a) all assets, properties

and franchises of Old Colony other than those of its Boston group and (b) the rights set forth above relating to the Boston group, the reorganized company shall issue and deliver to Old Colony's bondholders (including its banks as holders of the bonds pledged to secure their notes) pro rata, at the same time as reorganization securities are distributed to the principal debtor's creditors, in full satis- [fol. 93] faction of their rights with respect to such bonds and notes: $4,063,784 of new first and refunding bonds, series A, and $3,047,838 of new income bonds, series A; and the reorganized company shall also issue $857,143 of additional new first and refunding bonds, series A, and $642,857 of additional new income bonds, series A, of which the reorganized company shall deliver as aforesaid so much in principal amount, in the ratio of 32,896 of fixed interest bonds to 24,672 of income bonds, as the actual credit to Old Colony for the year 1943 shall exceed $346,000: and the reorganized company shall also (subject to the limitation provided herein concerning the Boston Terminal Company) assume and pay (a) the reorganization expenses of Old Colony as allowed by the court within the maximum limits fixed by this Commission, (b) current liabilities of Old Colony incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are entitled to priority over the Old Colony's secured obligations, (c) current liabilities and obligations of Old Colony trustees incurred during the reorganization proceeding, (d) any and all taxes due to the United States, the Commonwealth of Massachusetts, and/or any city, town, or other political subdivision thereof, from the Old Colony or its trustees for any taxable period prior to the date of confirmation of the plan of reorganization, without requiring proof thereof in the reorganization proceeding and without prejudice by reason of not having been approved in such proceeding, subject, however, to the statutes of limitations normally applicable to the assessment and collection of such taxes, and provided further, that the liability of the Old Colony for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable

[fol. 94] statutes of limitations, shall be determined pursuant to law, and provided further, that this provision shall not be deemed to preclude either the reorganized company, the Old Colony, or its trustees, from contesting the merits of any such tax in the manner provided by law, and provided further, that with respect to taxes the funds for the payment of which are withheld by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof as shall be agreed upon with the proper taxing authorities; provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property; and (e) the reorganized company shall assume and discharge any and all other claims against the Old Colony which, as of the date of confirmation of the plan of reorganization, have been allowed by the court, excluding, however, any claims ranking junior to Old Colony's bonds.

O. The reorganized company shall acquire, as promptly as possible, all of the properties, franchises, and assets of the Boston and Providence Railroad Corporation, hereinafter called the Boston & Providence, on the terms and conditions set out below, such acquisition to take place in the ev nt of, and upon confirmation of, the Boston & Providence plan concurrently approved by us in Finance Docket No. 12131.

* * * * * * *

(2) In consideration for the transfer and conveyance to the reorganized company of all assets and property of the Boston & Providence, the reorganized company shall issue and deliver to the Boston Providence trustees $3,039,213 of its first and refunding bonds, series A, $1,467,520 of its income bonds, series A, and $1,467,520 of its preferred stock, [fol. 95] series A, and the reorganized company shall also (subject to the limitation provided herein concerning the Boston Terminal Company) assume and pay (a) the reorganization expenses of the Boston & Providence, as allowed by the court within the maximum limits fixed by this Commission, (b) current liabilities of Boston & Providence incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are

entitled to priority over the Boston & Providence's debentures, (c) current liabilities and obligations of the Boston & Providence trustees incurred during its reorganization proceeding, (d) any and all taxes due to the United States, the Commonwealth of Massachusetts, the State of Rhode Island, and/or any city, town, or other political subdivision thereof, from the Boston & Providence or its trustees for any taxable period prior or subsequent to the date of confirmation of a plan of reorganization for the Boston & Providence, without requiring proof thereof in the reorganization and without prejudice by reason of not having been proved in the Boston & Providence reorganization proceeding, subject, however, to the statutes of limitations, if any, normally applicable to the assessment and collection of such taxes, and provided, further, that the liability of the Boston & Providence for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided, further, that this provision shall not be deemed to preclude either the reorganized company, the Boston & Providence, or the latter's trustees, from contesting the merits of any such tax in the manner provided by law, and provided, further, that, with respect to taxes the [fol. 96] funds for the payment of which were not advanced by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof as shall be agreed upon with the proper taxing authorities, provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property and (e) the reorganized company shall assume and discharge any and all other claims against the Boston & Providence which, as of the date of confirmation of the plan of reorganization of the Boston & Providence, having been allowed by the court of jurisdiction in the proceeding for the reorganization of that corporation, excluding, however, any claims represented by the Boston & Providence debentures and any claims not ranking senior thereto.

R. The construction of the plan by the court shall be final

and conclusive. The court shall have the power to cure any defect, supply any omission, or reconcile any inconsistency in such manner and to such extent as may be necessary or expedient in order to carry out the plan effectively.

U. The carrying out of the plan shall be as provided in the Bankruptcy Act.

[fol. 97] IN UNITED STATES DISTRICT COURT

ORDER AND DECREE—September 5, 1951

The petition of The New York, New Haven and Hartford Railroad Company for instruction and relief as to certain assessments laid upon its real property in the Borough and County of Bronx, State of New York, by the City of New York, the supporting affidavit of George H. Webster, sworn to on January 23, 1951, the answer of the City of New York to said petition, and the affidavits of Meyer Scheps, sworn to on December 14, 1950 and January 10, 1951, in opposition to said petition, having been filed, served and read, and the petition having come on for hearing pursuant to Revised Order of Notice, dated November 6, 1950, and the petition having by direction of the Court been heard on January 2, 1951, and Hermon J. Wells, Esq., having appeared by Edward R. Brumley, Esq., in support thereof, and John P. McGrath, Esq., having appeared by Meyer Scheps, Esq., in opposition thereto, and briefs in support thereof and in opposition thereto having been filed, served and read, and due deliberation having been had, and the Court having issued its Memorandum of Decision, dated August 8, 1951, granting said petition, and notice of settlement of this Order and Decree to give effect to said decision having been waived, now, on motion of counsel for petitioner, it is Ordered and decreed:

1. That the petition be and it hereby is granted in all respects.

2. That neither the Plan of Reorganization of The New York, New Haven and Hartford Railroad Company nor the Consummation Order and Final Decree entered in the [fol. 98] reorganization proceedings of said Railroad Com-

pany nor any orders or deeds issued pursuant thereto require or direct the payment or assumption by said Railroad Company of any or all of the assessments set forth in Exhibit A attached to the petition, a copy of which is attached to this Order, or of the liens therefor.

3. That the real property of The New York, New Haven and Hartford Railroad Company is free and clear of the aforesaid assessments and of all liens therefor.

4. That the City of New York, its successors and assigns, be and they are forever restrained, enjoined and barred from enforcing the aforesaid assessments and the liens therefor, from starting or attempting to start any action or proceeding for their enforcement, and from interfering with or disturbing The New York, New Haven and Hartford Railroad Company or its real property on account of said assessments and liens.

5. That the City of New York shall forthwith cancel, discharge and remove of record all of the aforesaid assessments and the liens therefor.

Enter:

C. C. Hincks, U. S. D. J.

Dated: New Haven, Connecticut, Sept. 5, 1951.

Notice of settlement of the foregoing Order and Decree is hereby waived.

John P. McGrath, Corporation Counsel for the City of New York.

(List of Assessments annexed to Decree previously printed herein at page 7 as Exhibit A, annexed to petition.)

[fol. 99] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—September 18, 1951

SIRS:

Please take notice that the respondent, The City of New York, hereby appeals to the United States Circuit Court of Appeals, Second Circuit, from the order and decree entered herein in the office of the Clerk of the United States

District Court, District of Connecticut, on or about the 5th day of September, 1951, granting the petition in all respects, and which order and decree among other things orders and decrees that the real property of The New York, New Haven and Hartford Railroad Company is free and clear of the assessments set forth in Exhibit A attached to the petition and of all liens therefor, and the respondent, The City of New York, appeals from each and every part of said order and decree as well as from the whole thereof.

Dated, September 18th, 1951.

Yours, etc., Denis M. Hurley, Corporation Counsel of the City of New York, Attorney for Respondent, The City of New York, Office and P. O. Address: Municipal Building, Borough of Manhattan, New York City.

To Edward R. Brumley, Esq., Attorney for Petitioner-Debtor, Room 3841, Grand Central Terminal, New York City; Clerk of the United States District Court, District of Connecticut.

[fol. 100] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL—September 18, 1951

Please take notice that the City of New York, appellant, designates as the contents of the record to be certified by the Clerk of the United States District Court, District of Connecticut, and to be filed with the Clerk of the United States Court of Appeals as the record on appeal, the following portions of the record on file in the District Court.

1. Statement under Rule 15b.
2. Petition of Debtor for Instructions, etc.
3. Revised order of Notice, annexed to Petition.
4. Exhibit A, annexed to Petition.
5. Affidavit of George H. Webster, in Support of Petition.
6. Answer of the City of New York.

7. Affidavit of Meyer Scheps, sworn to on December 14, 1950, in Opposition to Petition.
8. Order No. 32 referred to in Affidavit of Meyer Scheps.
9. Extracts from Order No. 1, referred to in Affidavit of Meyer Scheps.
10. Page 7980 of Record, referred to in Affidavit of Meyer Scheps.
11. Affidavit of Meyer Scheps, sworn to on January 10, 1951, in Opposition to Petition.
[fol. 101] 12. Order No. 736, referred to in Affidavit of Meyer Scheps.
13. Order No. 736A, referred to in Affidavit of Meyer Scheps.
14. Order No. 822, referred to in Affidavit of Meyer Scheps.
15. Submission of Lists of Stockholders and Creditors, referred to in Affidavit of Meyer Scheps.
16. Memorandum of Decision of Hincks, U. S. D. J.
17. Order and Decree of Hincks, U. S. D. J.
18. Notice of Appeal.
19. City's Designation of Contents of Record on appeal.
20. Stipulation as to Record.
21. Clerk's Certificate.

This designation is being filed and served pursuant to Rule 75a of the Rules of Civil Procedure.

Dated, September 18, 1951.

Yours, etc., Denis M. Hurley, Corporation Counsel, Attorney for City of New York, Appellant, Office and P. O. Address: Municipal Building, Borough of Manhattan, City of New York.

[fol. 102] In United States District Court

Appellee's Counter Designation of Contents of Record on Appeal—September 27, 1951

Please take notice that The New York, New Haven and Hartford Railroad Company, petitioner in the above-entitled action and appellee in this appeal, designates as the contents of the record to be certified as such by the Clerk

of the United States District Court, District of Connecticut, and to be filed with the Clerk of the United States Court of Appeals for the Second Circuit as the appeal record, the following portions of the record, in addition to those already designated by the City of New York in its designation dated September 18, 1951:

1. The whole of Order No. 1.
2. The whole of Order No. 5.
3. The whole of Order No. 32.
4. Subdivision 3 of Section II, Subdivision 1 of Section VIII and Section XI of Order No. 1007.
5. Sections L, N (4), O (2), R. and U of the Plan of Reorganization.
6. This designation.

This designation is being filed and served pursuant to Rule 75-a of the Rules of Civil Procedure.

Dated: September 27, 1951.

Yours, etc., Edward R. Brumley, Attorney for The New York, New Haven and Hartford Railroad Company, Appellee, Office and P. O. Address: 3841 Grand Central Terminal, Borough of Manhattan, New York, New York.

[fol. 103] In United States District Court

Memorandum of Decision on Motion of the Reorganized Debtor for Instructions, Hincks, J.—August 8, 1951

Statement

The New York, New Haven and Hartford Railroad Company, the petitioner herein and the reorganized company upon which have devolved the assets of the railroad-debtor which was reorganized in these proceedings, asks this court for instructions as to whether or not the Plan of Reorganization and the Consummation Order and Final Decree, in the reorganization proceedings brought pursuant to Section 77 of the Bankruptcy Act, require the payment or assumption of any or all of certain assessments laid by the

City of New York (hereinafter referred to as the "City") against various properties owned by the Debtor, herein, all more specifically set forth in Exhibit A attached to its petition, or make any reservations in favor of the City. The petition seeks a further order that, in the event the questions just posed are judicially answered in the negative, this court declare (a) that the described real property is free and clear of such assessments and of all liens thereof, (b) that the City be forever restrained, enjoined and barred from enforcing these liens and from interfering with or disturbing the petitioner and its real property on account of such liens, and (c) that the City be directed and ordered [fol. 104] to cancel, discharge and remove of record all such assessments.

The gravamen of the petition is contained in paragraph 8 thereof, wherein it is alleged that the City of New York, although it had timely notice of the reorganization proceedings of the petitioner, refused to file claims for any of the assessments set forth in Exhibit A attached to the petition; that the City's failure to comply with the terms of the Bar-Order, No. 32 in the reorganization proceedings, dated January 4, 1936, barred the City of New York from participating in the reorganization, and consequently rendered these liens unenforceable against the reorganized debtor.

The City contends that the reorganization proceedings in no way affected, limited or barred the City's outstanding assessments which had accrued and become liens prior to the institution of the reorganization proceedings. It further contends that since this Court never exercised jurisdiction over the City's liens during the proceedings it is too late to assert that jurisdiction now. Lastly, it is contended that the course of conduct of the Debtor, its Trustees and counsel practically construed the Plan of Reorganization as reserving the City's assessment liens and created an estoppel which prevents the petitioner from now maintaining a contrary position.

The New Haven condends that the plan and order make no reservation or exception in favor of the unpaid assessments here involved and contain no direction to pay or assume them. On the contrary, its contention is that the assessments and liens therefor are now forever barred,

and that the attempts made by the City of New York to collect and enforce them are in violation of this court's injunction.

Prior to October 23, 1935, the date of the filing and approval of the Petition in Reorganization, and between June [fol. 105] 8, 1894 and January 15, 1930, various assessments for local improvements were levied by the City, which purportedly under the City's charter became liens on specific properties owned by the New York, New Haven and Hartford Railroad Company. The principal amount of these liens is $134,153.94. If still in force, interest to December 31, 1950, has accumulated thereon in the amount of $369,653.92. All of these properties involved were located in the Borough and County of Bronx, City and State of New York.

At the time each such assessment was made, the City's Charter as then in force provided what I now assume to have been a complete and adequate procedure for administrative and judicial review. Within the time limited by the Charter, the debtor took no steps to avail itself of this procedure, taking the position throughout, I now am told, that the assessments were void *ab initio*. However, for all present purposes I assume that the assessments in question and the liens thereon were valid and, following the liened property into the hands of the bankruptcy trustees, continued to have vitality unless and until discharged, as the petitioner contends, by the Consummation Order and Final Decree in the reorganization proceedings.

The last assessment in point of time prior to October 23, 1935 (when the reorganization proceedings were instituted) contained in Exhibit A attached to the petition, was entered on January 15, 1930, and if valid became a lien, according to the applicable statute on January 25, 1930 (Greater New York Charter, Sec. 159, enacted by Laws of New York 1897, Chap. 378 as revised by Laws 1901, Chap. 466).

These assessments, if valid, constituted specific liens against the respective parcels of real property which are designated by block and lot numbers on the Tax Map of the City of New York (*Greater New York Charter, supra*, [fol. 106] Sec. 159; *New York City Charter*, adopted by referendum November 3, 1936, pursuant to Laws 1934, Chap.

867, in effect January 1, 1938, Sec. 314). These liens, if valid, each were enforceable exclusively against the specific property affected. (*Administrative Code of the City of New York*, 1937, Chap. 929, Sec. 415 (1)-23.0 et seq.; Chap. 17 Title D), and were not enforceable against any other assets of the debtor which was under no personal obligation to pay the same.[1]

If the assessments were valid, the specific lien of each from the moment of its attachment to the individual parcel of real property affected thereby became a first, prior and paramount lien against such premises, continued to be a lien thereon "preferred in payment to all other charges," (Greater New York Charter, supra, Sec. 1017; Administrative Code of the City of New York, supra, Sec. 415 (1)-7.0), unless and until later terminated in the reorganization proceedings under the paramount power created by the National Bankruptcy Act.

Each piece of real estate which the City now contends is subject to a valid and continuing lien has never been in the possession of the City: from the date of each assessment each such piece of real estate has been in the exclusive possession or the exclusive control of the debtor until the institution of the reorganization proceedings, thereafter of the debtor's trustees until the consummation of reorganization, and thereafter in the reorganized railroad company.

Further facts relevant to particular contentions made will be stated in connection with my discussion of the particular contention.

The parties are in conflict in their construction of the Plan of Reorganization. The plan provides (Section R): "The construction of the plan by the court shall be final and conclusive." In the Consummation Order and Final [fol. 107] Decree of the Court entered September 11, 1947, jurisdiction was reserved (Section XI 2(d)) "to construe the Plan as to matters which may require construction, not dealt with in this order." It is thus plain, and I think not disputed, that in the present situation the court has the power and duty to settle the conflicting contentions as to the proper construction of the Plan. I address myself to that task.

By amendatory legislation, viz., the Act of August 27, 1935, 49 Stat. 911, Section 77 of the Bankruptcy Act was amended to contain certain provisions:

> "The term 'creditors' shall include, for all purposes of this section, all holders of claims, of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, * * *." And
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribed to stock), liens, or other interests of whatever character."

These provisions were carried over into 11 U. S. C. A. 205: they were in effect when the reorganization of the debtor was instituted on October 23, 1935, and were in force throughout the reorganization proceedings.

Under the unequivocal language of these provisions the City throughout the proceedings by reason of the claimed assessment liens here involved was a creditor within the purview of the Act because it held a "claim" against the debtor's "property," a "claim" being defined to include a "lien." This conclusion follows from the unequivocal dictum in *Gardner* v. *New Jersey*, 329 U. S. 565. I refer to this as *dictum* because there the court was concerned with taxes which were a general charge against all the debtor's lands, tangible property and franchises in the [fol. 108] State. Here, as the City points out, the charge was limited by State law to liens upon the specified property assessed. However, the opinion in the *Gardner* case refers to the definitions contained in Section 77(b) of "creditors" and "claims" as "sweeping" and "all-inclusive" leaving "room for no exception." The City here, just as much as the State of New Jersey in the *Gardner* case, was a "creditor" and its liens were "claims" against the debtor.

Subdivision (c)(7) of the same Act, also contained a provision, also in effect throughout these proceedings, viz.:

> "The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced, and after which no claim not so

filed or evidenced may participate except on order for cause shown * * *"

The City concededly neither within the time limited, nor within any extension thereof which it might have sought (but never did seek), filed any claim throughout the proceedings. Consequently, even if its claimed liens were valid and in force in 1935, which I assume for all purposes of this memorandum, under the plain language of the Act its liens may not "participate". The prohibition against *participation*, in the statutory context, obviously must be construed as broad enough to include the continuing right to have effect as valid liens upon the debtor's property: a creditor whose lien the plan leaves undisturbed certainly participates in the debtor's property.

Section 77 also contained in subsection (f) the following provision which was in force throughout the proceedings.

"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon * * * all creditors secured or unsecured, whether or [fol. 109] not adversely affected by the plan, and whether or not their claim shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. * * * The property dealt with by the plan, when transferred and conveyed to the debtor * * * shall be free and clear of all claims of * * * creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer * * *"

This language was incorporated into the plan by reference, Sec. U thereof providing that "the carrying out of the plan shall be as provided in the Bankruptcy Act": the language was expressly incorporated into the order of confirmation entered September 6, 1945 (P. R. 11931). And pursuant to the authority contained in this subdivision of Sec. 77, the order of court directing the transfer of the debtor's property, as contained in its so-called "Consum-

mation Order and Final Decree" of September 11, 1947, under the heading "Transfer and Discharge" in express language included an adjudication that "the entire property * * * of the Debtor * * * shall vest in and become the absolute property of the Reorganized Debtor, free and clear of all claims * * * liens * * * of creditors * * *, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company * * *." Said order in a later section followed the plan itself in specifically identifying and excepting some 27 separate obligations which were to be assumed (many of them liens): the order expressly provided for the payment in cash by the reorganized debtor of all taxes due the United States and for the payment of taxes from a specified secondary debtor (Old Colony) to the Commonwealth of Massachusetts. But neither the plan [fol. 110] nor the Consummation Order excepted the City's liens here in question from the provision that the reorganized debtor should hold "its entire property" * * * free and clear of all claims.

The content and provisions of the plan quoted and referred to above, against the statutory background and the confirmation order of September 6, 1945, which has effect under subdivision (f) of Sec. 77 quoted above, make plain the intent that the reorganized company was to hold free from claims never filed such as the claims of the City for the assessments and liens now in question. To give these liens continuing effect would violate the express prohibition of subdivision (c)(7) of Section 77 quoted above. Certainly the court should not impute to the plan a meaning which not only would be inconsistent with its text and the terms of the Order of Confirmation and Order of Consummation but also would be in violation of subdivisions (c)(7) and (f) of Section 77.

The City points to the fact that when Order 32, fixing the time within which claims were to be filed, was entered, the court ordered notice thereof by mail to the mortgage trustees but to other creditors, including the City, only by publication. As to this the City does not dispute that it had actual notice of the bankruptcy: its argument is that the failure of court to cause notice by mail to be given the

City whose claimed lien was prior to that of mortgage trustees imported an intent to leave the City's liens undisturbed. The argument is specious. Order 32 was entered in 1936 long before any plan of reorganization had been proposed. Order No. 1, on October 23, 1935, had included substantially the same provision of notice as was included in Order 36. It would be preposterous to construe the substantive provisions of a plan confirmed in 1945 by reference to the terms of an *ex parte* administrative order of notice entered in 1936 before any plan at all had been formulated. Surely the City cannot seriously argue that [fol. 111] on reading the initial petition for reorganization the court foresaw what some future plan would ultimately provide for unnamed creditors and shaped its order of notice accordingly. In 1935 and 1936 necessarily the court could only assume that only creditors whose claims should be filed and approved would participate in the debtor's assets.

By somewhat similar, and equally specious, reasoning the City points to Order 736 of March 13, 1944, classifying creditors and stockholders for purposes of the plan. The City was not mentioned in this order and seemed not to fall within any stated classification. From this it is argued that for purposes of the plan the City was viewed as not affected by the plan,—that it's lien was to be left undisturbed. Here again the City shut its eyes to the prohibition of subdivision (c)(7) of Section 77. The absence of any approved claim was of course the real reason for not including the City in the classification.

With greater plausibility the City invokes Section L of the Plan which provides:

> "L. Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

However, reading this provision against the context of Sec. 77 and particularly subdivisions (c) and (f) thereof quoted above, it is apparent that in Sec. L, in speaking only of "claims" meant *filed* claims: subdivision (c)(7) of Sec. 77 [fol. 112] denies any and all priority to claims not filed. Since the City's claim was never filed it was not a *claim entitled to priority* under Section L.

Nor can the City justly find comfort in the provisions of the final decree which expressly provided for the continuance of tax liens of the City of Boston on property of the Old Colony, a secondary debtor to whose property under the plan the reorganized company succeeded. That no such provision was stated for the City's liens imports an intent that no similar exception of the City's liens was intended. And for this difference in treatment there were at least two good reasons: (1) the Boston liens had been properly submitted to the Court for an order of payment, and (2) the Boston liens had accrued when the liened property was in the hands of the court's trustees and thus had the status of claims against the trustees, which under basic provisions of law were classified as expenses of administration and as such were to be assumed by the reorganized property.

The City also points to the provisions of the deed which pursuant to the Consummation Order and Final Decree transferred the property to the reorganized debtor. By this deed the property was "subject to the liens of taxes and assessments lawfully levied or assessed against the same". But this provision of the deed must be construed in harmony with the Consummation Order (which has already been discussed) and the terms of the Habendum Clause in the same deed which made it plain that the reorganized company took free and clear except as to "obligations imposed on the Corporation pursuant to the Consummation Order or assumed by the Corporation pursuant to the Consummation Order." As pointed out above the Consummation Order did *not* impose the City's liens on the reorganized corporation.

In short, on the point of construction none of the City's arguments have sufficient substance to alter my conclusion [fol. 113] that it was the intent of the plan that the reorganized company should take free and clear of all claims

not filed in the reorganization proceeding including those of the City now under consideration.

The contention that the prohibition of subdivision (c)(7) of the Act, adverted to above, does not apply because the trustees in bankruptcy took no affirmative action to litigate the validity of the City's lien has no support in the text of the Act or in any adjudicated cases. The case of *Delaney v. City of Denver*, 185 F. 2d 246 upon which the City heavily leans, is not in point. That case was not one under Sec. 77: it dealt only with treatment of liens in ordinary liquidation cases in bankruptcy. There the court was not confronted with the unequivocal prohibition of (c)(7) of Section 77. The non-action by the trustees, like non-action by a creditor, may not serve to amend an Act of Congress.

But even the *Delaney* case did not go so far as to hold that when liened property has passed into the possession of the trustee in bankruptcy the lien creditor may stand outside the bankruptcy proceedings and after their termination enforce his lien against the property notwithstanding an order of the bankruptcy court discharging all claims not filed. The opinion holds merely that "after the jurisdiction of the bankruptcy court has attached to the security, the lien claimant may assert his claim to such security—only in the bankruptcy court" and that to that end a creditor's petition to the bankruptcy court while the estate was still open was timely even though filed some two months after the six-month period allowed under the Chandler Act for the filing of claims. Although the opinion states—by way of dictum, be it noted, that the lien creditor "may not file a claim at all and rely solely on his lien" it cites to that proposition *United States National Bank* v. *Chase National Bank*, 331 U. S. 28, at page 33, where the Supreme Court qualified that right by restricting it to cases in which "the [fol. 114] security is properly and solely in his (i.e., the creditor's) possession." That qualification was satisfied neither in the *Delaney* case nor in the case now at bar. And there was neither holding nor intimation in the *Delaney* case that the lien there involved would have survived if as was the fact here, no claim of lien *and no petition to enforce a lien* had been filed while the bankruptcy case was open.

After all, Section 77(c) confers on the reorganization court "exclusive jurisdiction of the debtor and its property

wherever located." In the *Gardner* case this grant was held to include property subject to liens of the State of New Jersey. It was there said: "This is comprehensive language suggesting that all liens are included, not that some are beyond the reach of the court." Such language may not be emasculated by writing in a limitation whereby the jurisdiction broadly granted shall exist only if affirmatively invoked by trustees in bankruptcy.

Lastly, the City contends that, by reason of the affirmative conduct of the court's trustees and their counsel, the reorganized company is estopped from asserting that it now holds the real estate upon which the City's assessments were made free from the lien thereof. The contention is based upon the fact that in the course of the reorganization proceedings the court's trustees made certain payments to discharge assessment liens of the City, similar to those now involved, upon specific pieces of real estate. These payments were made, without specific order of court and without any prior notice to other creditors in the reorganization proceedings, in some cases in order to obtain from the City the proceeds of liened properties which had been sold in lieu of condemnation, and in all cases wholly without acknowledgment that the assessments were valid or that similar assessments would be paid. Most of the payments to which the City refers in this connection were paid in 1936 [fol. 115] long before any plan at all had emerged and all had been made, of course, before the claims therefor had been barred by the entry of the Consummation Order and Final Decree. And all the payments referred to were made when the City still had time (a) either to petition the reorganization court for permission to make a late filing of its claim,—a permission which was consistently accorded to other creditors throughout the reorganization proceedings, or (b) to file a petition of intervention, as was done in the *DeLaney* case, for the enforcement of its liens.

This position, also, is untenable. In the first place, there is no factual basis for a finding that the non-action of the City was in any way due to these payments. There were no express representations which induced non-action. A payment of one claim while it still has vitality, without more, is surely not enough to induce a reasonable belief that other similar claims to the same creditor will be paid

even if they shall thereafter became barred. And especially is this so when the fiduciaries making the payments now relied on were acting under a statute prohibiting participation by barred claimants. If the payment of a few claims had any tendency to induce non-action one would expect that the consistent refusal throughout proceedings lasting twelve years to pay the great bulk of such claims would have a stronger tendency to demonstrate the imperative need of affirmative action. As to payments by the trustees of claims which accrued in the course of the reorganization proceedings, these, of course, are wholly irrelevant. Such claims, as expenses of administration, were not within the scope of the bar order.

And in law there is no support for the claimed estoppel. Creditors in the reorganization proceedings, whose rights against the debtor under the plan have now been transformed into rights in and to the reorganized company, could not be validly estopped by the administrative acts of the [fol. 116] debtor's trustees of which they had neither knowledge nor notice. Nor may the doctrine of estoppel serve to nullify the statutory prohibition of Sec. 77(c)(7). The only permissible inference is that all the parties acted with a view to the applicable law.

Somewhat as an afterthought, by reply brief the City advances the contention that my indicated rulings will deprive it of its liens without due process. The contention is predicated upon earlier provisions of the Bankruptcy Act not applicable to proceedings under Sec. 77. No contention is made that the procedure of Sec. 77 was not faithfully followed in these proceedings, or even, if that be important, that the City lacked knowledge of the pendency of these proceedings under Sec. 77. Thus the City was chargeable with knowledge throughout that if the claims

Footnote: (1) Whether the liens under the law of New York were enforcible by foreclosure upon the property specifically liened is a point not developed in argument and brief. From the silence of the parties on this point I infer that they consider it irrelevant for present purposes and in that view I acquiesce. I assume, however, that even if foreclosure was an available collection remedy no right to a deficiency judgment against the debtor was authorized.

were not filed it might not participate. Its continued failure to assert its claims in any way while the proceedings were in progress cannot be attributed to lack of due process.

I conclude that the petition should be granted. A decree providing the relief sought may be submitted for settlement in chambers, on notice unless notice be waived.

Dated at New Haven this 8th day of August, 1951.

C. C. Hincks, United States District Judges.

[fol. 117] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Stipulation Omitting Certain Papers—November 1, 1951

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the list of stockholders and creditors referred to in the affidavit of Meyer Scheps, the entire plan of reorganization and all of Order No. 1007 (except those portions printed in the transcript of record) be omitted from the transcript of record without prejudice to the right of either party to refer to the same on the argument of the appeal or in the briefs, with the same force and effect as though printed in full.

It is further stipulated and agreed that if any of the foregoing are referred to in the briefs or upon the argument copies thereof will be handed up to the Court.

Dated, New York, November 1, 1951.

Denis M. Hurley, Corporation Counsel, Attorney for Appellant; E. R. Brumley, Attorney for Appellee.

[fol. 118] In United States District Court

Stipulation as to Record—November 15, 1951

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the foregoing is a true transcript of the record on appeal of the

said District Court in the above-entitled matter, as agreed upon by the parties, and may be filed in lieu of the original papers for the purpose of certifying a record on appeal.

Dated: November 15th, 1951.

Denis M. Hurley, Corporation Counsel, Attorney for the City of New York; Appellant; Edward R. Brumley, Attorney for The New York, New Haven and Hartford Railroad, Appellee.

[fol. 119] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 120] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 213

Argued April 17, 1952. Decided June 5, 1952

Docket No. 22293

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

THE CITY OF NEW YORK, Appellant,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellee

Before Swan, Chief Judge, Augustus N. Hand and Frank, Circuit Judges

Appeal from the United States District Court for the District of Connecticut

This is an appeal by the City of New York from an order entered in the debtor's reorganization proceedings.

[fol. 121] Denis M. Hurley, Corporation Counsel, for appellant; Seymour B. Quel, Meyer Scheps and Anthony Curreri, of counsel.

Edward R. Brumley, Attorney for Appellee; Robert M. Peet, of counsel.

Per CURIAM:

Order affirmed on the opinion of the District Court, — F. Supp. —.

FRANK, Circuit Judge, dissenting:

The district judge in his opinion, and my colleagues in adopting and affirming it, have, I think, overlooked the crucial issues which are these: Subdivision (c)(8) of § 77 requires that the "judge shall cause reasonable notice" to be given, "by publication or otherwise," to creditors "of

the period in which claims may be filed," after which period, under (c)(7), no claim not filed "may participate except on order for cause shown." Is it "reasonable" for the judge in a § 77 proceeding to direct the bankruptcy trustees to give no such notice, other than by publication, to a known creditor? If not, and if no other notice (so to file claims) is given such a known creditor, will the final decree in reorganization destroy the rights of such a creditor whose claim is not covered by the reorganization plan, simply because he has not filed, or sought to file, a claim? As I think the answer to both questions is "No," I would reverse in this case. (See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306; *Smith* v. *Apple*, 6 F. (2) 556, 564 (C. A. 8), and other cases discussed *infra*.)

The debtor here was the former New Haven Railroad Company. Its reorganization proceedings took place in [fol. 122] the United States District Court for the District of Connecticut. The claimant is the City of New York. Its claims consist of tax liens for assessments on some of the debtor's real property in New York City. Because of their nature, the railroad was never personally liable on these claims; they were enforceable only against the specific pieces of real estate assessed. In most instances, the City does not even know the names of the owners of the real estate assessed. For that reason, and because of the expense of collecting by judicial procedure the large number of such claims, the City, since there is no statute of limitations running against the liens, normally collects its due on the sale of the assessed property when the owner seeks to pass a clear title to the purchaser.

Here, the debtor and its reorganization trustees, knowing of the City's claims and, of course, knowing the City's address, never gave the City actual notice, by mail or word of mouth, that on January 4, 1936 the bankruptcy court had entered a bar order, Order No. 32, requiring all creditors to file their claims before May 1, 1936, or have them wiped out. The only notice of the bar order to the City was by newspaper publication which never came to the City's attention. After the expiration of the period fixed in the bar order, the City (in some way not explained) heard of the pending reorganization proceedings, but never learned of the bar order. In 1936, 1940 and 1942 the trus-

tees had dealings with the City concerning some of its tax lien claims which were then paid in full or (by compromise) in part—without the City filing any claim in, or appearing in, the reorganization proceedings, although those claims were of the same kind as the claims here in dispute. The trustees then never even hinted to the City of the making of the bar order or suggested that the City's remaining $134,000 claims would be destroyed if the City did not, by leave of court, file claims in the proceedings.

[fol. 123] 1. Undeniably, there was a clear violation in these proceedings of the notice requirements of § 77, requirements designed for the protection of creditors. This chapter of non-compliance begins with a failure to comply with subdivision (c)(4) of § 77. That subdivision says that the judge shall direct "the trustees * * * to file with the court a list of all known creditors of the debtor, and the * * * character of their debts, claims and securities, and the last known post-office address or place of business of each * * * creditor." The judge never directed the filing of such a list. No list was ever filed containing the name of the City or referring to its claims although the new railroad freely admits that the debtor and the trustees knew about them.

The new company argues, unreasonably I think, that, even if such a list had been prepared, the City's name would have been omitted and properly so because the debtor and the trustees had, from the beginning, disputed the validity of the City's claims. The error of the argument is that the statute clearly contemplates the inclusion in that list of doubtful or disputed claims, since it specifically immunizes the debtor or its trustees from any bad effects therefrom: "The contents of such lists shall not," says subdivision (c)(4), "constitute admissions * * * in a proceeding under this section or otherwise." But this argument does lead to a suspicion that the real reason behind the trustees' silence may just possibly have been that something would happen exactly like that which did happen here, *i.e.*, the City, not receiving notice of the bar order, would not file claims; its unfiled claims would be by-passed in the reorganization plan; and the new company would then assert that, after final decree, those claims were worthless.

The failure of the judge to direct the trustees to file a

proper list containing the names and addresses of known [fol. 124] creditors, and the failure of the trustees to file one, was followed by a further signal failure to comply with the statute, and led to the fact that the City was not properly notified, and did not learn, of the bar order: When the judge came to ordering notice to creditors of that bar order, he did not provide that notice by mail be given to all known creditors with known addresses (a class which included the City). Instead, he adopted the following classification: (1) notice by mail to be given all creditors who had entered appearances up to that date (whether or not their claims had been allowed or were considered "valid") and also to certain prominent indenture trustees whose liens were junior to the City's; (2) notice by publication to all other creditors, *i.e.*, all non-appearing creditors—whether known or unknown.

The judge, in effect, substituted, as far as notice of the bar order was concerned, "appearing" creditors for "known" creditors. Section 77(c)(8), in contrast, requires that "reasonable notice of the period in which claims may be filed, * * * be given to creditors * * *" It is not by accident that the provision for a list of "known" creditors (§ 77(c)(4)) precedes §77(c)(8): Congress intended that the judge should cause appropriate notice to be given to all "known" creditors, and contemplated that such notice would be different from that given unknown creditors.

Subdivision (c)(8) does not, I think, sanction an arbitrary distinction, as regards such notice, between appearing and non-appearing creditors. Such a distinction is unreasonable. It runs exactly contrary to the giving of "reasonable" notice. For obviously it is not the "appearing" creditors who are most in need of notice of the bar order. Their appearances show they already have an active interest in the proceedings. It is precisely those known creditors who have not appeared—creditors like the City—[fol. 125] who need the notice, prescribed by statute, of the deadline for filing claims.

It is most important, then, that notice by publication does not constitute "reasonable notice" in circumstances like these, where the creditors are known and can easily be notified by mail. This has been definitively settled by *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S.

306. There a New York statute, which provided for the cutting off of claims to a common trust fund after notice, by publication only, to beneficiaries about a proceeding brought by the trustee to settle accounts, was held unconstitutional as to those beneficiaries whose names and addresses were known, and who could be easily notified by mail. Said the Supreme Court: "* * * when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. * * * It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's formal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with [fol. 126] actual notice, we are unable to regard this as more than a feint. * * * Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses."

The *Mullane* case summarized what the Supreme Court had been saying for a long time before. *Hess* v. *Pawloski*, 274 U. S. 352, upheld a non-resident motorist statute, providing for service on the non-resident by serving the registrar in the state where the accident occurred and

notifying the non-resident motorist by registered mail, because "it is required that he (the non-resident) shall actually receive and receipt for notice of the service and a copy of the process." Cf. *Wuchter* v. *Pizzutti*, 276 U. S. 13 (where a non-resident motorist statute not providing for mail notification was held lacking in due process); *International Shoe Co.* v. *Washington*, 326 U. S. 310. See also 2 Moore, Federal Practice, par. 4.16 (2d ed. 1948). In *McDonald* v. *Mabee*, 243 U. S. 90 (holding that notice by publication was inadequate to secure jurisdiction over a defendant technically domiciled in Texas but who had actually gone elsewhere to establish residence, although in the same circumstances personal service at his Texas abode might have sufficed), Holmes, *J.*, said: "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact * * * To dispense with personal service, the substitute that is most likely to reach the defendant is the least [fol. 127] that ought to be required if justice is to be done." For constructive notice is a fiction.[1]

3. Although the City did not receive reasonable notice of the bar order because the district judge neglected to comply with subdivisions (c)(4) and (c)(8), the judge now holds (with my colleagues' approval) that the City has lost its rights because it neglected to follow up constructive notice. The judge rests this harsh conclusion on the fact that the City learned, in an unexplained way, not of the bar order, mind you, but merely of the existence of the reorganization in 1936 (as near as we can tell, after the end of the original period for filing claims but in time to apply to the court for late permission to file). However, without some specific statutory provision imputing knowledge of the bar order to anyone having merely knowledge of the reorganization proceedings, I think the City cannot be charged with notice of whatever it could have found, if it had carefully examined the reorganization records.

[1] See *Schoedel* v. *State Bank of Newburg*, 245 Wis. 74, 76, 13 N. W. (2d) 534. "At the outset, attention should be called to the fact that constructive notice is in point of literal fact neither notice nor knowledge. * * * The term 'constructive' is the mere trademark of a fiction."

In the first place, consider the practical aspects of my colleagues' ruling: If the City is thus charged, its burden will be insupportable. It has no system by which it can tell who are the proper owners of each piece of land against which local assessments may be laid. To find that out, it would have to search the titles of each piece. More, if my colleagues' ruling stands, the City will be responsible for recognizing the names of all such property owners in the notices of bankruptcy proceedings, and for tracking down the records in those proceedings all over the United States, looking for bar orders. The waste of time and energy seems pointless when the debtor's trustees know the City is [fol. 128] a creditor entitled to notice, and have only to include the City in the list of known creditors to be notified of the bar order by mail.

But let us disregard this argument of impracticality, and consider the singular judicial attitude here displayed: (1) The statute expressly commanded the court to give a known creditor "reasonable notice" of the bar order, and that means notice by mail. (2) The court did not obey that express command. (3) Yet the court, having neglected its own express duty, now excuses that neglect by fictionally imputing to the creditor "constructive notice" of the bar order, holding that the creditor was fatally negligent in not following up the knowledge, fortuitously obtained, that the reorganization proceedings existed to the point where the creditor would find in the court files the notice to file claims. In the circumstances, to hold the creditor negligent seems to me strikingly unjust: As the statute called for actual notice of the bar order, the creditor ought not be asked to act on less, especially since (as I shall point out later) the doctrine of judge-made constructive notice depends on gross negligence by the person said to be charged with such notice.

(I must add, parenthetically, that, in referring to the trial judge's neglect, I am not taking a superior attitude: Any judge, being a man, may err at times; and certainly my memory of my own judicial career shows me that I have done so. But all that is beside the point here.)

Here, by chance, the creditor came to hear of the proceedings; we may assume that the creditor was familiar

with the statute; the statute told him that the court would order that he be given specific notice of the time to file his claims. Was it not reasonable for him to wait to file until he received such a notice? Why, then, call him negligent for not filing when he did not receive such notice required by the statute?

[fol. 129] Apposite is *Smith* v. *Apple*, 6 F. (2d) 559, 564 (C. A. 8). There a state-court ordered a certain further step to be taken in a suit within the near future and on notice to the parties to the suit. This further step was taken without any notice to one of the parties; and a decree against that party was entered accordingly. The Eighth Circuit said: "While it is true that parties properly in court must take notice of steps in the litigation, yet where an order of court requires notice before specified action be taken, the parties have a right to rely upon the giving of that notice and are not bound by such action taken without notice and without their actual knowledge." *A fortiori*, mere knowledge that there is pending a long drawn-out proceeding ought not be deemed to give notice of a step in that proceeding when specific notice of that step is statutorily required but not given.[2]

In the *Mullane* case, the statute provided for notice by mail to the known beneficiaries at the time when the trustee first invested in the common fund; this notice disclosed that there would be future judicial accountings by the trustee. Yet the Supreme Court held that this initial mailed notice did not excuse the omission of a notice by mail to known beneficiaries shortly before each subsequent judicial accounting.

Suggestive, too, are cases holding that, when a statute prescribes a particular form of notice which is constitutionally invalid, the defect is not cured by notice of a kind not provided in the statute. See, *e. g.*, *Wuchter* v. *Pizzutti*,

---

[2] It is worth noting that railroad reorganization proceedings are almost always lengthy; this one lasted some twelve years. A creditor, hearing that they have begun, may not unreasonably sit back through the passing years, believing that he will be notified that the time has come for filing his claim.

276 U. S. 13, 24: "But it is said that the defendant here had actual notice by service out of New Jersey in Penn- [fol. 130] sylvania. He did not, however, appear in the cause and such notice was not required by statute. Not having been directed by the statute, it cannot, therefore, supply validity to the statute or to service under it."[3]

When, as here, the creditor, who knows of the reorganization proceeding under § 77, also knows, by reading § 77, that he is not to file a claim until notified to do so, it is curious to hold that his knowledge of the reorganization proceeding, without more, constitutes notice to file his claim, so that, if he does not file, his claim is expunged. Yet that is what my colleagues hold.

In so holding, my colleagues decide that the provisions of subdivision (c)(4)—as to filing lists of known creditors—and, more important, of (c)(8)—as to reasonable notice of the bar order—are virtually superfluous, that a perfect substitute for those provisions is found in the creditor's mere knowledge (however obtained) that the proceedings are pending. As above noted, my colleagues achieve this result by treating such knowledge as constructive notice of the bar order. Now such a constructive-notice clause is contained in § 17(a)(3) of the Bankruptcy Act, 11 U. S. C. § 35, which specifically provides that, although a creditor's claim is not scheduled by the bankrupt or filed by the creditor, it is barred by a discharge, if the creditor had actual knowledge of the proceedings.[4] I shall assume the validity of § 17a(3),

---

[3] See also *Coe* v. *Armour Fertilizer Works*, 237 U. S. 410, 424-425; *In re Ives*, 314 Mich. 690, 23 N. W. (2d) 131, 134.

[4] This has been construed to mean knowledge in time to file and participate in the proceedings. 1 Collier on Bankruptcy (14th ed. 1940) par. 17.23, p. 1637.

In the Act of 1867, there was no equivalent of § 17a(3). Yet some lower courts held that claims omitted by inadvertence from the debtor's schedules, even if the creditors knew nothing of the proceedings, would be cut off by a discharge. See, e. g., *Lamb* v. *Brown* (D. C. Ind. 1875), 14 Fed. Cas. No. 8,011. I have little doubt that today such a provision would be held unconstitutional as to known creditors.

[fol. 131] despite the *Mullane* case.[5] But that provision is not applicable to § 77, which contains no equivalent.[6] I think that, especially as Congress deliberately omitted it from § 77, the courts may not read in such a constructive-notice clause. For such a clause—the consequence of which is that knowledge of a fact is fictionally imputed to one who has no actual knowledge of that fact—is ordinarily a creature of statute; courts usually will not impose the onerous burden of constructive notice on a litigant when it has not been imposed by the legislature. *Ex parte Caplis*, 275 F. 980, 986 (W. D. Tex.); *in re Leterman, Becher & Co.*, 260 F. 543, 547 (C. A. 2); *Burck* v. *Taylor*, 152 U. S. 634, 653-654. A court certainly should hesitate to do so when, in the light of the *Mullane* case, the validity of such an explicit legislative provision would be doubtful.[7]

The structure of § 77 makes it peculiarly unfair to import into it a judge-made, constructive notice clause: (1) In ordinary bankruptcy, to which § 17a(3) applies, there is no statutory provision—like § 77(c)(8)—requiring the judge to direct that a reasonable notice be given creditors of [fol. 132] a time within which they must file claims; a known

---

[5] The Supreme Court has not directly held § 17a(3) constitutional, but has done so inferentially. *Hanover National Bank* v. *Moyses*, 186 U. S. 181.

[6] See 5 Collier, Bankruptcy (14th ed. 1943), par. 77.10.

In ordinary bankruptcy, a creditor, with knowledge of the date of the institution of the proceedings, knows that, under § 57n, his final deadline is six months and some odd days from that time, whereas the § 77 creditor can only speculate on what the judge will consider a "reasonable time" for filing claims under § 77(c)(7), and on when indeed the judge will set that date.

[7] The following cases—*distinguishable on their facts*—contain dicta contrary to my position: *Mohonk Realty Corp.* v. *Wise Shoe Stores*, 111 F. (2d) 287, 290 (C. A. 2); *Piedmont Ice & Coal Co.* v. *American Service Co.*, 130 F. (2d) 78 (C. A. 4); *North American Car Co.* v. *Peerless W. & V. Mach. Co.*, 143 F. (2d) 938 (C. A. 2); *Knapp* v. *Detroit Leland Hotel Co.*, 153 F. (2d) 715 (C. A. 6).

All these cases were decided before the Mullane *case.*

creditor cannot, therefore, argue that he was awaiting that notice before filing.[8] (2) But (as already observed) a known creditor in § 77 proceedings is reasonable (*i. e.*, not negligent) in waiting for receipt of the specific notice to file, because § 77(c)(8) tells the creditor that such a notice must be given him.

4. It is, then, pertinent that, as a general rule, judicially invented constructive notice is thought to be particularly objectionable where the litigant has not been guilty of gross negligence or fraud. See, *e.g.*, *United States v. Detroit Lumber Co.*, 200 U. S. 321, 333. In this connection, consider a few outstanding equities on the City's side:

(a) The City, even with full knowledge of the proceedings, might well have been misled into thinking that, notice or no notice, it did not need to file claims for its tax liens. The question had never been definitively answered by the Supreme Court. *Gardner v. New Jersey*, 329 U. S. 565, related on its facts only to the reorganization court's jurisdiction to adjudicate *in personam* tax debts which were a general lien on all tangible property of the bankrupt. The question of whether a filing was required of exclusively *in rem* claimants, with tax liens restricted to particular properties assessed, remained open, so far as I know, until today.

(b) The provisions of the plan itself may well have confused the City into thinking its claims would not be affected. Order No. 1, in 1935, authorized the trustees, without more, in their discretion, to pay all taxes or assessments due on the debtor's properties; this was clearly applicable to the City's tax liens. And the old railroad company did not list the City's claims in its asset-liability statement of debts to be affected by bankruptcy. Order No. 736, classi- [fol. 133] fying creditors and stockholders, set forth no classification of claims like the City's, although the order directed that the names of all creditors falling within the listed classes be sent to the Interstate Commerce Commission. The first ICC Report stated that the Plan should provide for the payment of all pre-bankruptcy liabilities which took priority over the mortgages—and the City's did. The Final Order transferred the property "subject to the

[8] See note 6, *supra*.

liens of taxes and assessments lawfully levied and assessed against" the real property. Section L of the Plan read:

"Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

The trial judge has said that all these indications that the City was not meant to be affected by the plan should be disregarded because of the over-riding "intent of the plan that the reorganized company should take free and clear of all claims not filed in the reorganization proceeding." At first glance, it may seem that the judge, who participated in the shaping of the plan and who made the orders affecting it, is the best interpreter of the plan and those orders. But I recall these remarks of Lord Halsbury, about a draftsman's interpretation, in *Hilder* v. *Dexter*, 1902 A. C. 474: "My lords, I have more than had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language, which in fact has been employed."

[fol. 134] In any case, whatever the proper construction of the plan, the questions were close enough, I think, to excuse the City from jumping from the knowledge of the proceedings to the knowledge that it must file a claim. How much trouble would have been saved if the judge in accord with the statute, had only directed the trustees to mail notices to all known creditors to file their claims.

(c) I want to mention again the trustees' unexplained silence about the barring order, or the necessity for filing claims, in their dealings with the City, in 1936, 1940 and 1942, concerning the City's similar claims.

My overall conclusion is that justice has not been done in this case.

5. Finally, I have some doubt whether the district judge properly engaged in an interpretation of the plan and the court orders in their effect on the City's claims. Federal jurisdiction is patently but ancillary and of a kind to be exercised only "under unusual circumstances." *Ciavarella* v. *Salituri*, 153 F. (2d) 343 (C. A. 2); *Greenfield* v. *Taccillo*, 129 F. (2d) 854, 857 (C. A. 2); *Milando* v. *Perrone*, 157 F. (2d) 1002, 1004 (C. A. 2); *In re Devereaux*, 76 F. (2d) 522 (C. A. 2). Cf. *Prudence Bonds Corporation* v. *City Bank Farmers Trust Co.*, 186 F. (2d) 525 (C. A. 2). I see no such circumstances here.

[fol. 135] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of June one thousand nine hundred and fifty-two.

Present: Hon. Thomas W. Swan, Chief Judge, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of THE NEW YORK, NEW HAVEN & HARTFORD RR Co., Debtor; THE CITY OF NEW YORK, Appellant.

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of the District Court, ——F. Supp.——.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 136] [Endorsed:] United States Court of Appeals for the Second Circuit. In the Matter of The New York,

New Haven & Hartford R.R. Co. (The City of New York). (213). Judgment. United States Court of Appeals Second Circuit, filed June 5, 1952, A. M. Bell, Clerk.

[fol. 137] Clerk's Certificate to foregoing transcripf omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 203

THE CITY OF NEW YORK, Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(33663)

Supreme Court of the United States

No. 203 —October Term, 1952

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DENIS M. HURLEY,
Corporation Counsel of the City of New York;
Municipal Building,
New York, N. Y.

SEYMOUR B. QUEL,
MEYER SCHEPS,
ANTHONY CURRERI,
HARRY E. O'DONNELL,
of Counsel.

INDEX

Table of Cases Cited

Table of Statutes Cited

Supreme Court of the United States

No. —October Term, 1952

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
against
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Supreme Court of the United States:

The petition of the City of New York respectfully shows:

1. Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

2. The respondent is The New York, New Haven and Hartford Railroad Company which was reorganized in proceedings brought pursuant to § 77 of the National Bankruptcy Act (11 U. S. Code, Chap. 8, § 205) in the United States District Court for the District of Connecticut, Docket No. 16562.

Statement of Matter Involved

3. Prior to October 23, 1935, the date of the filing and approval of the Petition in Reorganization, and between June 8, 1894 and January 15, 1930, various assessments for local improvements were levied by the City of New York, which became *in rem* liens (with no accompanying *in personam* obligation) on specific parcels of real property owned by the New York, New Haven and Hartford Railroad Company (6-7, 19-51, 84, 315-316).* The principal amount of these liens is $134,153.94 (84). Together with interest to December 31, 1950, just prior to the argument of this matter in the District Court, there was due to the City $503,807.86 (*Ibid.*). On June 30, 1952, there was due to the City for principal and interest $517,894.02. All of these parcels of real property are located in the Borough and County of Bronx, City and State of New York (6). These assessments, all set forth in Exhibit A attached to the petition of the railroad company in the present proceedings, were levied and became specific liens, pursuant to and in conformity with applicable provisions of the Charter of the City of New York in existence at the time of each respective assessment levy and are enforceable exclusively, and by proceedings *in rem* only, against the specific parcels affected (84, 88-89, 315-316). Until paid each assessment lien is a first, prior and paramount lien against the parcel affected, and is preferred in payment to all other charges (89, 317).

4. At no time during the course of the reorganization proceedings, which were terminated on September 11, 1947, by the Consummation Order and Final Decree of the District Court, did the City file a claim for its assessment liens (323). On the other hand, at no time during the course of the reorganization proceedings were the assessment liens

* References are to folios of the Record unless otherwise indicated.

specifically brought into question before the District Court by the Debtor or its Trustees (58). No specific bar order was ever served upon the City of New York and no application was ever made in the District Court to determine the validity of these liens (*Ibid.*). On November 2, 1950, over three years after the reorganized Debtor on September 18, 1947 took title to this property by deed from the Trustees, the Railroad Company petitioned the District Court in this ancillary proceeding for instructions as to whether the Plan of Reorganization and the Consummation Order and Final Decree, under which it took title, required it to pay or assume any of the assessment liens in question, and in the event such instructions were in the negative, the Court was asked to declare that the Railroad's property was free and clear of the City's assessment liens. The Railroad also asked that the assessment liens thereupon be cancelled, discharged and removed of record (14-15).

5. After a hearing before Hon. CARROLL C. HINCKS, District Judge, the Railroad's petition was granted in all respects and its real property involved herein was declared free and clear of the City's assessment liens. The City was further directed to cancel, discharge and remove of record all of the said assessments and the liens therefor (289-294).

6. Upon appeal by the City to the United States Court of Appeals for the Second Circuit, that Court, on the opinion of the District Court, affirmed the order appealed from, FRANK, C. J., dissenting (pp. 120-134).

7. The majority of the Court of Appeals, adopting the views of the District Court, in effect held that the City of New York was a creditor within the purview of § 77 of the National Bankruptcy Act. The Court held that the City's failure to file a claim for its assessment liens within the period provided for in a general bar order in which the City was not specifically named as a creditor, and of which the City of New York received no notice except that

constructively supplied by publication, constituted a bar to the City's right to participate in the assets of the Railroad. Thus, it concluded, the reorganized Railroad Company acquired the railroad property free and clear of the City's assessment liens (323-324, 336-337).

8. The dissenting opinion of Judge FRANK pointed out that the question whether a taxing authority holding specific *in rem* tax liens, such as those here involved, is a "creditor" within the compass of § 77 of the National Bankruptcy Act, has not been decided definitively by this Court (p. 132). The dissent said that in fact the decision of the majority below is the first holding that such a taxing authority is such a creditor (*Ibid.*). Assuming, without apparently conceding, that the City is such a creditor, the dissenting Judge nevertheless found, on the authority of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), that the City of New York was deprived of its assessment liens without due process, on the theory that constructive notice by publication of a general bar order requiring the filing of claims without more, will not effectively operate to bar the claim of a creditor whose name and address are known to the Debtor and its Trustees (pp. 125-126).

Jurisdiction and Timeliness

9. The petition is made under 28 U. S. Code § 1254(1), and the Court has jurisdiction to grant the writ. The appeal to the Court of Appeals from the District Court was taken pursuant to § 24 of the National Bankruptcy Act (11 U. S. Code, Chap. 4, § 47).

10. The decision of the Court of Appeals was handed down on June 5, 1952, and the order thereon was entered on the same day. This petition is, therefore, timely. Issuance of the mandate has been stayed pursuant to stipulation entered into between counsel, and approved by order of Hon. AUGUSTUS N. HAND, a Judge of the United States Court of Appeals for the Second Circuit.

Statutes Involved

11. Section 77 of the Bankruptcy Act (11 U. S. Code, Chap. 8, § 205) contains, among other provisions, certain definitions to be used for the purposes of that section, which are germane to the issues here involved.

12. The pertinent provisions, as they now appear in § 77, are the same as they were on August 27, 1935 (49 U. S. Stats. 911-926), when the Congress made substantial amendments to § 77 as originally enacted on March 3, 1933 (47 U. S. Stats. 1474-1482).

13. Subdivision (b) of § 77 now provides in part as follows:

> "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

14. The comparable provisions of § 77(b) as enacted in 1933 read as follows:

> "The term 'creditors' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this act."

15. No definition of the word "claims" was included in § 77 as originally enacted in 1933. The definition of the word "claims" which now appears in the statute was first added thereto by the amendatory legislation in 1935.

16. Section 77 also provides at subdivision (c)(4) as follows:

> "(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise."

17. Section 77 further provides at subdivision (c)(7) as follows:

> "(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests."

18. Lastly, § 77 provides at subdivision (c)(8) as follows:

> "(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

The Questions Presented

19. The first question presented is whether, contrary to the historical treatment of tax liens in bankruptcy, the holder of *in rem* tax liens (for which no personal liability exists), which were imposed upon specific parcels of the Debtor's real property prior to the inception of proceedings to reorganize such Debtor under § 77 of the National Bankruptcy Act, is a creditor within the meaning of subdivision (c)(7) thereof.

20. If the first question is answered affirmatively, then the second question presented is whether, under the provisions of § 77(c)(8) of the National Bankruptcy Act requiring "reasonable notice" to a creditor "of the period in which claims may be filed", such reasonable notice is afforded to a creditor, whose name and whereabouts are known to the Debtor and its trustees, merely by publication of a notice to file claims pursuant to a general order requiring such filing, particularly where the creditor is not named, either in the general order or the published notice.

Opinions Below

21. The opinion of the District Court (307-345) is unreported. The majority of the Court of Appeals affirmed the order of the District Court on the opinion below, Judge FRANK dissenting in a separate opinion (pp. 120-134). The opinions of the Court of Appeals are also unreported.

22. The opinion of the District Court, which was adopted by the majority of the Court of Appeals, held that the City of New York, the holder of the *in rem* assessment liens in question, was a creditor of the Debtor in reorganization within the meaning of § 77(b) of the National Bankruptcy Act (321). It reached this conclusion in complete reliance upon what the Court itself admitted to be dictum contained in *Gardner* v. *New Jersey*, 329 U. S. 565, 573 (1946) (*Ibid.*). It then held that the failure of the City of New York to file a claim for its assessment liens in the reorganization proceedings, pursuant to a general notice to creditors served constructively by publication only, barred the City from participating in the reorganization proceedings and operated effectively to discharge the City's assessment liens (323-324, 336-337). In so holding, the Courts below went further than this Court or any other court had to that moment gone in the treatment of statutory tax liens in proceedings under the National Bankruptcy Act (see dissenting opinion, FRANK, C. J.—p. 132).

23. In the District Court, the City urged, on the authority of *DeLaney* v. *City and County of Denver*, 185 F. 2d 246 (U. S. C. A., 10th Cir., 1950), that in *any* proceeding under the National Bankruptcy Act, a statutory tax lienor may rely upon his lien and need file no claim therefor. The District Court denied the applicability of the *DeLaney* case, first, because it involved an ordinary bankruptcy and, second, because, in the Court's opinion, the principle of law stated in the *DeLaney* case and urged by the City is valid only when the liened property is in the possession of the creditor (337-340). The latter conclusion was reached by the District Court in reliance upon its construction of this Court's decision in *U. S. Bank* v. *Chase Bank*, 331 U. S. 28 (1947) (339-340). In the Court of Appeals the City called attention to *Clem* v. *Johnson*, 185 F. 2d 1011 (U. S. C. A., 8th Cir., 1950) which reiterated the rule that a filing of a claim in bankruptcy is not essential to the preser-

vation of a lien whether or not the liened property is in the possession of the lienor, and expressly approved the decision in the *DeLaney* case. The City also pointed out that the qualification added to the rule of the *DeLaney* case by the District Court was urged upon the Court of Appeals in the *Clem* case and there rejected, on the express ground that no such qualification was intended by the decision in the *United States Bank* case. By adopting the District Court's opinion, the Court of Appeals necessarily construed this Court's decision in the *United States Bank* case in a manner which conflicts with the construction given that case by the Court of Appeals in the Eighth Circuit in the *Clem* case.

24. The District Court answered the City's argument that it was entitled to notice at least equivalent to that furnished to mortgage trustees (who received notice of the general bar order by mail), by stating that "it would be preposterous to construe the substantive provisions of a plan confirmed in 1945 by reference to the terms of an *ex parte* administrative order of notice entered in 1936 before any plan at all had been formulated" (330). It further excused its failure to classify the City of New York as a creditor in Order No. 736 made March 13, 1944, apparently in compliance with § 77(c)(7), by its statement that the absence of any approved claim by the City was the real reason for not including the City in the classification order (331-332).

25. The Court also found that the City's arguments that the entire reorganization proceedings were not intended materially or adversely to affect the assessment liens of the City did not have sufficient substance to alter the conclusion that it was the intent of the Plan that the reorganized company should take free and clear of all claims not filed in the reorganization proceedings, including those of the City (336-337).

26. In essence, the City's position in the District Court was that the general notice to file claims served, if at all, upon the City by publication, violated the basic requirements of due process, in that it failed to give the City the reasonable notice which, under the statute, it was entitled to receive. The District Court, however, held that its intention was to bar all creditors who did not file claims pursuant to its general bar order and that the City was chargeable with knowledge that if its claim was not filed it might not participate (346-347).

27. This lack of due process was most forcibly pointed out in the dissenting opinion of Judge FRANK in the Court of Appeals (pp. 121-134). He did not discuss the primary contention of the City, i.e., that it was not a creditor within the meaning of § 77, except to point out that that question had not been decided until the determination in this case (p. 132). He would, however, have ruled for the City of New York solely upon the ground that the notice to file claims was completely ineffective in so far as the City was concerned because, following *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), constructive notice by publication upon a creditor whose name and address is known to the debtor does not satisfy the requirements of due process (pp. 125-126). He pointed out that the specific provisions of § 77(c)(8) require the Court to give "reasonable notice" of its order to file claims; that this reasonable notice should have been directed to those creditors whom the debtor was first required to list by § 77(c)(4); that such a list of creditors would necessarily have contained the name of the City of New York, because the statute requires the listing of all known claims, disputed or not (pp. 123-124). He criticized severely the procedure by which the District Court permitted the Debtor to foreclose the disputed claim of the City of New York simply by failing to list it (pp. 123, 128). In short, the dissenting opinion points out that the courts below substituted the

City's knowledge that the reorganization proceedings were pending for the requirements of the statute that it be afforded reasonable notice of the necessity to file a claim for its assessment liens (p. 130).

28. The dissenting opinion further pointed out that the need for something more than constructive notice to file claims was increased by the fact that this Court has never ruled that the validity of an *in rem* tax lien restricted to a particular property may be adjudicated in a railroad reorganization proceeding without specific notice to the taxing authority (p. 132).

29. As further evidence of the necessity for something more than constructive notice, the dissenting Judge pointed out that the City might well have been justified in concluding that the Plan of Reorganization was not intended to affect its assessment liens and that it could rely on this unless and until it received specific notice of such intention (pp. 132-134).

30. Finally, the dissenting Judge expressed doubt as to whether the District Court properly engaged in an interpretation of the Plan of Reorganization and its orders in their effect on the City's claims. He stated that federal jurisdiction is patently but ancillary and of a kind to be exercised only under unusual circumstances. The dissenting Judge found no such unusual circumstances in this case (p. 134).

Assignment of Errors

31. The petitioner submits that the Court of Appeals erred:

(a) In holding that the City of New York was a creditor of the Debtor in reorganization within the meaning of § 77(b) of the National Bankruptcy Act.

(b) In holding that the provisions for notifying creditors of the time within which claims were to be filed, contained in Order No. 32 of the reorganization proceedings, constituted reasonable notice to the City of New York within the meaning of § 77(c)(8) of the National Bankruptcy Act.

(c) In holding that the City's assessment liens could be discharged without specific notice directed to the City of intention to adjudicate their validity.

(d) In failing to find that the Plan of Reorganization under which the Debtor was reorganized was not intended materially or adversely to affect the City's assessment liens.

(e) In failing to find that the discharge of the City's assessment liens by the method adopted in the District Court constituted a deprivation of the City's property without due process of law.

(f) In failing to find that the District Court, after the making of the Plan of Reorganization and the Consummation Order and Final Decree, improperly exercised ancillary jurisdiction to interpret the same.

(g) In affirming the order of the District Court.

Reasons for Granting the Writ

32. The decisions of the Court below have decided an important question of Federal law which has not been settled by this Court. In holding that the City of New York is a creditor within the meaning of § 77(b) of the National Bankruptcy Act, the District Court relied on what that Court characterized as dictum contained in *Gardner* v. *New Jersey*, *supra*. As was pointed out in the dissenting opinion of Judge FRANK in the Court below, the holding of the Court of Appeals is the first adjudication that exclusively *in rem* tax lienors whose liens are restricted to particular properties are required to file claims in a

railroad reorganization proceeding in order to preserve their liens. This question has not been decided by this Court and was not decided in the *Gardner* case. That case dealt with *in personam* tax obligations secured by a general lien on all of the debtor's property within the state. The railroad reorganization proceeding in the *Gardner* case was intentionally brought to test the validity of the state's taxes and the taxing authority voluntarily appeared therein. The opinion of the Court below decides an important question of Federal bankruptcy law, which, the petitioner respectfully submits, should be settled by this Court.

33. Furthermore, and aside from its novelty, the question presented is of importance in the administration of Federal bankruptcy law. The decision of the Court below constitutes a holding that in railroad reorganization proceedings taxing authorities which impose *in rem* tax liens against specific properties fall into the same category as general creditors of the debtor. As such, the Court holds, they may be barred by a general order requiring the filing of claims. This is a complete departure from the treatment heretofore accorded to *in rem* tax liens in proceedings under the National Bankruptcy Act. In ordinary bankruptcy proceedings, it has always been the rule that the filing of a formal claim is not essential to the preservation of a statutory tax lien; that, indeed, the lienor need file no claim at all but may rely solely upon his lien. *DeLaney* v. *City and County of Denver, supra; In re Harvey,* 122 Fed. 745 (D. C., E. D. Pa., 1903). In railroad reorganization proceedings, no statutory tax lien had heretofore been affected except upon specific notice to the taxing authority or following upon its voluntary appearance in the reorganization proceedings. *Gardner* v. *New Jersey, supra; In re Denver & R. G. W. R. Co.,* 23 F. Supp. 298 (D. C., D. Colo., 1938). If the decision of the Court below is permitted to stand it will impose upon taxing authorities

the affirmative obligation to ascertain the names and addresses of each owner of each separately assessed parcel of land, presumably after a search of title, and to recognize and identify the names of such property owners in notices of bankruptcy proceedings acquired after tracking down all such bankruptcy records in all the United States District Courts. This, as Judge FRANK pointed out in his dissenting opinion below, would be an insupportable burden upon taxing authorities (p. 127). Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in any bankruptcy or railroad reorganization proceeding, and necessarily involves the rights of all taxing authorities in this country whose only method of enforcing the collection of real estate taxes and assessments is the imposition of *in rem* liens upon the properties assessed.

34. The decision of the Court below involves a direct conflict with decisions of the Courts of Appeals in the Eighth and Tenth Circuits, viz., *DeLaney* v. *City and County of Denver, supra,* and *Clem* v. *Johnson, supra.* In those cases it was held that the filing of a claim in bankruptcy is not essential to the preservation of a lien. The decision of the Court below conflicts with this familiar principle of bankruptcy law and thus gives rise to the necessity for the settlement by this Court of the disputed question. Moreover, the decision below probably extends the holding of this Court in *United States Bank* v. *Chase Bank, supra,* beyond its original intendment. In *Clem* v. *Johnson, supra,* the holding in the *United States Bank* case was restricted to the facts in that case, which presented a situation where a lienor sought to participate in the general estate of the bankrupt and also to protect the security of his lien. The Court below, adopting the opinion of the District Court, read the *United States Bank* case as holding that only a lienor in possession of the liened property need not file a claim in bankruptcy in order to preserve his lien. It is respectfully submitted that *in rem* tax lienors, such as the

City of New York, are entitled to know from this Court whether they may no longer rely upon heretofore settled practice but are now compelled to file claims in preservation of their tax liens, simply because the liened real property has not been reduced to the lienor's possession.

35. Finally, the Court below has approved the procedure adopted by the District Court whereby, in direct violation of the applicable statute requiring the giving of reasonable notice to creditors of the time within which to file claims, the District Court directed the service of such notice exclusively by publication upon all creditors other than the holders of mortgage liens and such others as had appeared in the proceedings. This appears to be in conflict with the decision in *Mullane v. Central Hanover Bank & Trust Co., supra,* which holds that constructive notice by publication does not constitute due process where the party intended to be reached thereby and his whereabouts are known to the person giving the notice. In this case the City of New York, admittedly known to the Debtor at all times, was deprived of its property without due process of law, when it was held to be barred by an order to file claims of which it received only constructive notice by publication. It is respectfully submitted that this Court should exercise its inherent power of supervision over the administration of the Federal District Courts and decide whether a statutory tax lien may be discharged for failure of a taxing authority *known to the debtor* to comply with the provisions of a general bar order of which it receives constructive notice only.

CONCLUSION

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Court of Appeals for the Second Circuit to the end that the errors aforesaid may be corrected by this Court.

New York, N. Y., June , 1952.

Respectfully submitted,

THE CITY OF NEW YORK,
Petitioner,

By DENIS M. HURLEY,
Corporation Counsel of the City of New York,
Municipal Building,
New York 7, New York.

SEYMOUR B. QUEL,
MEYER SCHEPS,
ANTHONY CURRERI,
HARRY E. O'DONNELL,
of Counsel.

(33782)

Supreme Court of the United States

No. 203—October Term, 1952

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

DENIS M. HURLEY,
Corporation Counsel of the City of New York,
Municipal Building,
New York, N. Y.

SEYMOUR B. QUEL,
HARRY E. O'DONNELL,
MEYER SCHEPS,
ANTHONY CURRERI,
of Counsel.

INDEX

CITATIONS

United States Statutes: PAGE

Miscellaneous:

Supreme Court of the United States

No. 203—October Term, 1952

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
against
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 94-106) is reported at 197 F. 2d 428; the opinion of the District Court (R. 80-92), which was adopted by the majority of the Court of Appeals, is reported in 105 F. Supp. 113.

Jurisdiction

The decision of the Court of Appeals was handed down on June 5, 1952 and the order thereon (R. 106-107) was

entered on the same day. The petition for a writ of certiorari was filed July 16, 1952 and was granted October 13, 1952 (R. 108). The jurisdiction of this Court rests on 28 U. S. Code, § 1251(1).

Questions Presented

The issue in this proceeding is whether the City was required to file a notice of claim with the trustees in reorganization in order to preserve its statutory liens for local assessments against specific parcels of real property.

The City contends that since under the applicable New York statutes its liens ran only against the specific properties involved and did not involve any *in personam* liability upon the part of the Railroad, the filing of a notice of claim would have been a futile gesture upon its part. Stated differently, the filing of a notice of claim could have related only to the distribution of the general assets of the Railroad, in which the City had no right to participate. Accordingly, the failure of the City to ask for participation in assets in which it had no right to share cannot be construed as constituting a discharge of its *in rem* liens on specific parcels of real property owned by the Railroad.

The Railroad Reorganization Act (§ 77 of the Bankruptcy Act) defines creditors as those having claims; defines claims as including liens; and provides that failure to file a claim bars participation in the assets of the railroad in reorganization. Section 77 nowhere expressly provides that the failure to file a claim shall operate to discharge a tax lien, or indeed any *in rem* lien, so as to remove the encumbrance thereof from the liened property.

Concededly, in bankruptcy proceedings the failure of a lienor to file a claim does not operate to discharge the lien. There is no reason to suppose, and indeed all the evidence is to the contrary, that Congress by enacting the Railroad Reorganization Act as part of the Bankruptcy Act intended to abrogate the traditional right of a lienor in bankruptcy.

The first question presented, therefore, is whether, contrary to the historical treatment of tax liens in bankruptcy, the holder of *in rem* tax liens (for which no personal liability exists), which were imposed upon specific parcels of the Debtor's real property prior to the inception of proceedings to reorganize such Debtor under § 77 of the National Bankruptcy Act, is a creditor within the meaning of subdivision (c) (7) thereof.

If the first question is answered affirmatively, then the second question presented is whether, under the provisions of § 77 (c) (8) of the National Bankruptcy Act requiring "reasonable notice" to a creditor "of the period in which claims may be filed," such reasonable notice is afforded to a creditor, whose name and whereabouts are known to the debtor and its trustees, merely by publication of a notice to file claims pursuant to a general order requiring such filing, particularly where the creditor is not named, either in the general order or the published notice.

Thirdly and finally, even assuming that a lienor is ordinarily required to file a notice of claim in order to protect his lien, the question is presented whether the facts in this case indicate that the orders of the Reorganization Court were not intended to abrogate the City's assessment liens. Order No. 1, the very first order entered in the reorganization proceedings, expressly provided that the trustees pay all taxes and assessments due or to become due upon the properties of the Railroad. In the light of that order and further orders and procedures which are referred to hereafter in our brief, it is clear that there was no intent to nullify the City's assessment liens.

Statutes Involved

The statutes involved, which are the pertinent sections of the Bankruptcy Act, are printed in the appendix to this brief.

Statement

The proceeding now before this Court was instituted by the Railroad on November 2, 1950, by the filing of a petition in the United States District Court for the District of Connecticut. The petition sought a declaration that various assessment liens on specific parcels of real property owned by the Railroad located in the City of New York had been discharged by reason of the failure of the City to file a claim in the reorganization proceedings of the Railroad.

Prior to October 23, 1935, the date of the filing and approval of the Petition in Reorganization, and between June 8, 1894 and January 15, 1930, various assessments for local improvements were levied by the City of New York, and became liens on specific parcels of real property owned by the New York, New Haven and Hartford Railroad Company (R. 2, 6-16, 25, 82-83, 95). The principal amount of these liens is $134,153.94 (R. 25, 82, 96). Together with interest to December 31, 1950, there was due to the City $503,807.86 (R. 25). All of these parcels of real property are located in the Borough and County of Bronx, City and State of New York (R. 2). These assessments, all set forth in Exhibit A attached to the petition herein, were levied and became specific liens pursuant to and in conformity with applicable provisions of the Charter of the City of New York in existence at the time of each respective assessment levy and are enforceable exclusively and *in rem* only against the specific parcels affected (R. 25, 26, 82-83, 95). Until paid, each assessment lien is a first, prior and paramount lien against the parcel affected and is preferred in payment to all other charges (R. 26, 83).

For the purposes of this proceeding it must be assumed that these assessments, when first made, were validly imposed. The decision of the Courts below was predicated upon the assumption that these assessment liens were validly imposed and, following the liened property into the hands of the bankruptcy trustees, continued to have vitality until they were discharged by the Consummation Order and Final Decree in the reorganization proceedings (R. 82).

The last assessment in point of time prior to October 23, 1935, when the petition in the reorganization proceedings was filed, was entered on January 15, 1930 and became a lien, according to the applicable statute, on January 25, 1930 (R. 26, 82).

On October 23, 1935, the New York, New Haven and Hartford Railroad Company petitioned the District Court for its reorganization, pursuant to the provisions of § 77 of the Bankruptcy Act (R. 2). At no time during the course of the reorganization proceedings, which were not terminated until the Consummation Order and Final Decree of the District Court on September 11, 1947, did the City file a claim for its assessment liens (R. 85). On the other hand, at no time during the course of the reorganization proceedings were the assessment liens specifically brought into question before the District Court by the Debtor or its trustees (R. 18). No specific bar order was ever served upon the City of New York and no application was ever made in the District Court to determine the validity of these liens (*ibid.*).

Although the reorganized Debtor took title to this property by deed from the trustees dated September 18, 1947, it was not until more than three years later, on November 2, 1950, that it petitioned the District Court for instructions as to whether or not the Plan of Reorganization and the Consummation Order and Final Decree under which it took title required it to pay or assume any of the assessment liens in question (R. 4). In this petition for the first time the contention was made that Order No. 32 in the reorganization proceedings, dated January 4, 1936, a few months after the proceedings were instituted, constituted a complete bar to the City's assessment liens and required their cancellation and discharge (R. 3). Order No. 32 directed that claims of creditors be filed or evidenced by May 1, 1936 (R. 40).

The course of the development of the reorganization proceedings will be completely set forth and discussed hereinafter because it is an integral part of the petitioner's argument.

Summary of Argument

The Congress did not intend that statutory *in rem* tax or assessments liens, imposed prior to the inception of the reorganization proceedings upon specific parcels of real estate belonging to the Debtor, were to be considered as "claims" against the Debtor within the meaning of § 77(b) of the Bankruptcy Act. Consequently, the City was not a creditor within the meaning of § 77(c)(7) and was under no obligation to comply with the District Court's general order requiring the filing of claims. Its liens could not be discharged for failure so to comply. The Courts below conceded that their contrary decision was based upon *dictum* contained in *Gardner* v. *New Jersey*, 329 U. S. 565 (1947). If, as we contend, the construction of the *Gardner* case by the lower Courts went beyond its intendment, and the assessment liens of the City of New York are not included within the purview of § 77 of the Bankruptcy Act, then it follows that the reorganization Court had no power to discharge them by reason of the City's failure to file a claim.

Moreover, we contend, when the Railroad went into reorganization in 1935, nothing in the Bankruptcy Act as it then existed required the City to file a claim or to take any affirmative action in preservation of its liens. Either under the provisions of § 64(a) of the Bankruptcy Act as it then existed, which imposed upon the Debtor's trustees the affirmative duty of searching out and paying all taxes legally due and owing, or under the terms of the first order of the District Court in this reorganization proceeding authorizing the trustees to pay all taxes and assessments due upon the property of the Debtor, the City had a right to expect that its assessment liens would be paid or preserved. As a corollary right, it could also expect specific notice of any attack upon their validity.

But even if it be assumed (1) that the City *was* a creditor of the Debtor Railroad, and (2) that it might have been

required in a proper case to file a claim for its assessment liens, the City has been deprived of its property without due process of law if its liens were discharged simply by reason of its failure to file a claim as required by a general order of the District Court of which, at most, it received constructive notice by publication only. As a creditor whose name, address and interest were known to the Debtor, the reasonable notice required by the statute to be given to the City was not provided by the order and publication referred to, in neither of which was the City named.

Finally, independently of the questions of law hereinabove raised, an examination of the proceedings had in reorganization of this Debtor, the Plan of Reorganization certified by the Interstate Commerce Commission and the Consummation Order and Final Decree, reveals a complete lack of intent to affect the City's assessment liens, in consequence of which these liens were not materially or adversely affected by the Plan of Reorganization and survived the Consummation Order and Final Decree. In sum, from whatever aspect the proceedings below are viewed, the Courts below as a matter of law and fact erred in discharging the City's assessment liens.

ARGUMENT

POINT I

Statutory *in rem* tax or assessment liens, imposed prior to the inception of the reorganization proceedings, upon specific parcels of real estate belonging to the Debtor, are not "claims" against the Debtor within the meaning of § 77(b) of the Bankruptcy Act. Consequently, the City was not a creditor within the meaning of § 77(c)(7) and was under no obligation to comply with the District Court's general order requiring the filing of claims. Its liens could not be discharged for failure so to comply.

(1)

The decision of the Courts below rests entirely upon the premise that the definition of the word "claims" set forth in § 77(b) of the Bankruptcy Act encompasses the statutory assessment liens of the City of New York. It is our purpose, therefore, to demonstrate that at the inception of these proceedings in 1935 and in 1936, when Order No. 32 requiring the filing of claims was published, nothing in the Bankruptcy Act, including § 77 as amended in 1935, was intended to change pre-existing law and practice in bankruptcy with respect to statutory tax liens. When § 77 was enacted in 1933, the word "claims" was not defined and there was no indication that claims were intended to include liens. We shall further demonstrate that when in August, 1935, Congress added a definition of the word "claims" in § 77 (subdivision b thereof) and included in that definition the word "liens", it was not its intention thereby to embrace the encumbrances created by statutory tax liens of the character here involved.

Section 77 of the Bankruptcy Act was enacted in 1933. For the first time Congress provided a method of reorganizing a corporation which found itself in financial difficulties. Theretofore all of the provisions of the Bankruptcy Act

had dealt with the liquidation of estates of insolvent debtors and did not look to a preservation of their business, property and affairs.

In the years prior to 1933 tax claims and tax liens of states and their political subdivisions were governed by the provisions of §§ 64 and 67 of the Act. Section 64 provided an order of priority of payment of *debts* of bankrupts. Among such debts were those taxes which were legally due and owing by the bankrupt to states and their subdivisions. Because § 64 dealt with debts it was intended to cover only personal obligations of the bankrupt as distinguished from liens against his property. Under the provisions of § 67, as it existed in 1933, statutory liens for taxes were preserved and the trustee took his title subject to them. COLLIER, *Bankruptcy*, 14th Ed., Vol. 4, Par. 67.24, p. 201.

When § 77 was added to the Bankruptcy Act in 1933 it provided that proceedings under § 77 should be treated as in ordinary bankruptcy unless a specific provision of § 77 conflicted with some other specific provision of the Bankruptcy Act (§ 77 [1]). As § 77 stood in 1933, nothing appeared therein which was inconsistent with §§ 64 and 67 of the Bankruptcy Act. *Lyford* v. *State of New York*, 140 F. 2d 840, 845 (C. C. A., 2d Cir., 1944); REMINGTON, *Bankruptcy*, 1947 Replacement, Vol. 10, § 4239, p. 433. Furthermore, nothing in the debates or reports of committees of the Congress which preceded the enactment of § 77 in 1933 demonstrated an intent to depart in railroad reorganization proceedings from the ordinary method of treatment of statutory tax liens (Joint Hearings Before the Subcommittees of the Committees on the Judiciary [72nd Congress, First Session] on S. 3866, April 14, 1932, to April 28, 1932; Senate Report No. 1215, 72nd Congress, Second Session, submitted February 10, 1933 [Calendar Day, February 13, 1933], accompanying H. R. 14359; House Report No. 1897, 72nd Congress, Second Session, submitted January 23, 1933 accompanying H. R. 14359). Indeed, it affirmatively appears from the House Report (p. 5) that the purpose of

§ 77 was to do away with the expensive and protracted equity receivership procedure which was the only method by which interstate railroads could undergo reorganization and to make available to insolvent railroads the speedy and relatively inexpensive processes of the Bankruptcy Act.

Between 1933 and 1935 it became apparent that some of the provisions of § 77 were cumbersome, and especially was this true with respect to the provisions relating to voting by classes of creditors in adopting a Plan of Reorganization (House Report No. 1283, 74th Congress, First Session, p. 2; *Congressional Record*, 74th Congress, First Session, p. 13300 [Michener]).

Counsel for the Federal Coordinator of Transportation prepared a bill for introduction in the Congress intended to amend § 77 in a number of respects. The bill as introduced (H. R. 8587, 74th Congress, First Session), *inter alia*, added the definition of claims which now appears in § 77(b) and reads as follows:

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

It is noteworthy that nowhere in the hearings before the House Judiciary Committee, to which this bill was referred, nor in the reports of the Senate and House Judiciary Committees, nor in the debates on the floors of Congress was this particular amendment discussed or its purpose defined.

The prime purpose of the amendment of § 77 in 1935 was to provide "that two-thirds of those voting [on a plan of reorganization], whether they be creditors or stockholders, can bind all of a class, instead of two-thirds of the entire class, as in the present law. In other words, under the present law, a minority of one-third may block a reorganization. That is corrected by the bill H. R. 8587 which is now before us." *Congressional Record*, 74th Congress, First Session, p. 13301 (McLaughlin); see also House Report No. 1283, 74th Congress, First Session, p. 2. *Nowhere was it expressed or implied that the existing bank-*

ruptcy procedure with regard to statutory tax liens was intended to be altered or modified.

In the discussion on the floor of the House of Representatives, it was made manifest that no basic change in the policy theretofore existing with regard to railroad reorganizations was contemplated by the 1935 amendment. Representative Michener, a member of the House Committee on the Judiciary, which reported the bill out, stated (*Congressional Record*, 74th Congress, First Session, p. 13300):

> "In passing upon this bill we are not embarking upon a new policy. When the Congress passed section 77 of the bankruptcy law this method of railroad reorganization was given legislative sanction. The purpose of this legislation is to accelerate railroad reorganization as contemplated when section 77 was enacted."

A careful reading of all of the hearings before the House Judiciary Committee, comprising 330 pages of printed testimony, reveals an absolute lack of intent to amend § 77 with respect to statutory tax liens (Hearings before the Committee on the Judiciary, House of Representatives, 74th Congress, First Session, on H. R. 6249 [later H. R. 8587]). As a matter of fact, the subject of taxes and tax liens never once arose in these extensive hearings. On the contrary, Mr. Leslie Craven, counsel to the Federal Coordinator of Transportation, in expounding to the House Judiciary Committee the proposed amendments which he had drafted, pointed out that the purpose of the 1935 amendments was not to change priorities and other rights, as provided by the law of land, but to insert in § 77 express recognition thereof. He said (*id.*, at p. 60):

> "You do not want to forget the substantive provisions that I read to you yesterday, in which we require that there must be a recognition of priorities and other rights as provided by the law of the land. There is not anything like that in the present section 77. This law has more substance in it to protect rights than section 77 has."

His extensive discussion of the bill was confined to an exposition of the reasons underlying the main purpose of the amendment. In his concluding remarks he adverted to the fact that the bill contained other changes but he characterized these as being "minor" and he stated unequivocally that these changes were "not of particular significance" (*id.*, at p. 61).

We infer from all of the foregoing that the inclusion for the first time of a definition of the word "claims" was not intended to enlarge the class of creditors as previously defined in the 1933 enactment of § 77. In this connection it is significant that the definition of the word "creditors" was not materially changed by the 1935 amendment of § 77.

In ordinary bankruptcy, statutory tax liens on real property have always been considered as outside the reach of the bankruptcy court. Subdivision b of § 67 recognizes the validity of statutory tax liens and even provides that they may be perfected after the filing of the petition in bankruptcy. It has been recognized that this provision applies under § 77 since it is not inconsistent therewith. COLLIER, *Bankruptcy*, 14th Ed., Vol. 5, Par. 77.21, p. 540; REMINGTON, *Bankruptcy*, 1947 Replacement, Vol. 10, § 4239, p. 433. Indeed, REMINGTON, while recognizing that there is no inconsistency between §§ 77 and 67(b), goes further and states that statutory liens are entitled to the same protection in railroad reorganizations as they had in receiverships. It is clear, then, that at the time of the enactment of § 77 in 1933, there was no intention to subject the holders of statutory tax liens on real property, such as those here involved, to the necessity of filing proofs of claims in railroad reorganization proceedings in order to protect and preserve their liens. Had it been the intention of Congress to make § 67 inapplicable to railroad reorganization proceedings, it would have been a simple matter to have so stated. And as we have already demonstrated, the subsequent amendment of § 77, which *inter alia* added thereto a

definition of the word "claims", was not intended to effect a substantive change in the law. At most, it was intended to enumerate the types of creditors who were already subject to the provisions of the law.

(2)

In our opinion, the conclusion reached by the Courts below results from the failure to distinguish clearly between (1) a tax lien on real property, (2) a tax lien on personal property, and (3) a tax unaccompanied by any lien and enforceable only as a debt due from the bankrupt.

In 1935, when this reorganization proceeding was commenced, statutory liens for taxes owing to the United States or any state or subdivision thereof were recognized as valid liens against the bankrupt estate. It was always held that the trustee in bankruptcy took title subject to such liens. COLLIER, *Bankruptcy*, 14th Ed., Vol. 4, Par. 67.24, p. 201. The Chandler Act of 1938 was not intended to disturb statutory liens on real property. *Id.*, Par. 67.02, p. 33. In so far as statutory tax liens were concerned, the only change in the law effected by the Act of 1938 was to provide that such liens on *personal property* not in the possession of the lienor were to be postponed in payment to administration expenses and wage claims as provided for in § 64 (a) of the Bankruptcy Act. The validity of statutory tax liens on *real property* in the debtor's estate was recognized and continued in new subdivision b of § 67 of that Act. In sum, the treatment accorded statutory tax liens in the Bankruptcy Act from the date of its adoption (1898) to date has not changed.

In support of the distinctions above made, between tax liens and tax claims, the attention of the lower Courts was called to the decision in *De Laney* v. *City and County of Denver*, 185 F. 2d 246 (U. S. C. A., 10th Cir., 1950). While that case involved a statutory tax lien on personal property, and not real property, as here involved, the opinion contained what we consider to be significant lan-

guage pointing out that the provisions of § 64 of the Bankruptcy Act merely set up a system of priority of payment of debts and did not impinge upon the recognized basic principle that the debtor's estate is taken over by the trustee in bankruptcy subject to existing valid liens. Since the laws of Colorado did not require the tax lien there in question to be perfected by the seizure of the property, the Court in effect considered it as one of the liens protected by the provisions of § 67 (b) and squarely held that the filing of a notice of claim was not essential to its preservation. If, under the circumstances of that case, it was not necessary to file a notice of claim in order to preserve the statutory tax lien on personal property, it inescapably follows that it was not necessary for the City of New York to file a notice of claim to preserve its statutory liens on real property in this proceeding. They too were protected by § 67 (b). See also *In Re Harvey*, 122 Fed. 745 (D. C., E. D. Pa., 1903).

The Courts below held that the *De Laney* case had no application to the issue here involved because it was an ordinary bankruptcy and not a § 77 proceeding (R. 89). Furthermore, they decided that the principle laid down in the *De Laney* case—that a lienor need not file a claim but may rely solely on his lien—was restricted to cases in which the security is properly and solely in the lienor's possession, citing *United States Bank* v. *Chase Bank*, 331 U. S. 28, 33 (1947) (*ibid.*).

But in relying upon the *United States Bank* decision to weaken the effect of the holding in the *De Laney* case, it is clear that the Courts below erroneously construed the meaning of the former decison. In *Clem* v. *Johnson*, 185 F. 2d 1011 (U. S. C. A., 8th Cir., 1950), decided after the *De Laney* case, the holding in the *United States Bank* case was construed as being restricted to the facts in that case. There, a lienor sought to participate in the general estate of the bankrupt and also to protect the security of his lien. The rule that a filing of a claim in bankruptcy is not essen-

tial to the preservation of a lien, whether or not the liened property is in the lienor's possession, was reiterated in accord with the decision in the *De Laney* case (185 F. 2d, at pp. 1013-1014).*

Lastly, the "unequivocal prohibition" in § 77 (c) (7), upon which the lower Courts relied to distinguish the *De Laney* case (R. 89), is analogous to the provisions of § 57 (n) in that both sections set up statutes of limitations within which *claims* are to be filed. As pointed out in the *De Laney* case, *supra*, at p. 249, § 57 (n) applies to "tax claims, as distinguished from tax liens." It follows that the provisions of § 77 (c) (7) must also be held to apply to tax claims as distinguished from tax liens and that statutory tax liens may not be discharged by failure of the taxing authority to comply with a general order requiring the filing of claims.

(3)

It is not intended to be inferred from what has been said that the bankruptcy court is without power to deal with statutory tax liens. When the District Court took the property of the Debtor in *custodia legis*, it acquired jurisdiction over the specific parcels of real property to which the City's assessment liens had attached. But the power of the Court to deal with these liens did not include the power to bar them by a general order to file notices of claims. In *Gardner* v. *New Jersey*, 329 U. S. 565, 579-582 (1947), in enumerating matters with respect to tax liens into which the reorganization court might validly inquire, this Court gave no indication that these matters included power to discharge the liens for failure to file a notice of claim. As a matter of fact, it is made quite clear in the *Gardner* case

* The interpretation of the *De Laney* case by the Courts below, if permitted to stand, would present the anomalous situation of permitting a lienor of personal property in his possession to stand outside the bankruptcy while depriving a lienor of realty, particularly a tax lienor, of a similar right simply because such realty is not ordinarily found in the lienor's possession.

that even the power which exists may not be exercised unless affirmatively asserted (*id.*, p. 578, n. 7). In the present reorganization proceedings no jurisdiction over the City's liens was ever affirmatively asserted by the District Court between the inception of the proceedings and the entry of the Consummation Order and Final Decree.

In every case dealing with railroad reorganization proceedings which we have been able to discover and in which the legality of taxes assessed against the debtor was in issue, the reorganization court acquired jurisdiction either (a) by reason of the taxing authority's voluntary appearance (e.g., *Gardner* v. *New Jersey*, *supra*), or (b) by way of the trustee's application on notice to the taxing authority that the reorganization court adjudicate the legality or amount of the tax (e.g., *In re Denver & R. G. W. R. Co.*, 23 F. Supp. 298 [D. C., D. Colo., 1938]), or (c) by reason of the fact that the taxing authority had filed its claim for a tax which constituted a claim, unsecured by a lien on real property (e.g., *In Re New York, O. & W. Ry. Co.*, 25 F. Supp. 709 [D. C., S. D. N. Y., 1937]). We know of no reported decision in a railroad reorganization proceeding in which statutory tax liens were cut off because of the taxing authority's failure to comply with the requirements of a general notice to creditors to file claims.

Since the City of New York did not voluntarily appear in the reorganization proceedings or file its proof of claim therein, the only way in which the District Court could have exercised jurisdiction over the liens of the petitioner would have been upon the Trustees' application to the Court, on notice to the City, for an adjudication of the legality or amount of the assessment. At no stage in the reorganization proceedings was the District Court ever asked to assert any jurisdiction over these liens. At no time prior to the Consummation Order and Final Decree was the City of New York ever put on specific notice that the legality or the amount of these assessment liens would

be questioned. Thus, we contend that because the District Court never asserted jurisdiction over the City's assessment liens during the pendency of the reorganization proceedings it was error for it to entertain the application upon which the order appealed from was based.

(4)

We have refrained until now from a full discussion of *Gardner* v. *New Jersey*, 329 U. S. 565 (1947), which contains language which the Courts below characterized as "*dictum*" (R. 84), but upon which they nevertheless predicated their decision. Concededly, it is possible to read portions of the *Gardner* opinion out of context in such a way as to create the impression that it is decisive against the City in this proceeding. Thus, in the *Gardner* case, this Court said, for example (p. 573):

> "The words 'all holders of claims' have no qualification and are sufficiently broad to include public agencies as well as private parties. The 'claims' of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions."

Language of this kind would seem superficially to subject the City to the provisions of § 77. However, analysis of the decision and the record in the *Gardner* case reveals important and fundamental factual distinctions from the matter at bar. We think these distinctions make it apparent that the *Gardner* decision does not control the issue raised herein, and that the "*dictum*" expressed by this Court is limited and qualified by the facts. At any rate, the question whether specific notice to the taxing authority is necessary was not raised in the *Gardner* case and was not there decided since the State of New Jersey had voluntarily subjected itself to the Court's jurisdiction.

The *Gardner* case concerned taxes of the State of New Jersey which, by the laws of that state, constituted a *debt* due from the railroad for the recovery of which an action at law might be maintained. The statute creating this tax debt also made it a preferred debt in the case of insolvency. N. J. Stats. 54:29A-55. In addition, the New Jersey law provided that the taxes so imposed were and remained liens paramount to all other liens on the revenues and on *all* the real and personal property owned, used or controlled by the railroad company within the state. *Id.*, 54:29A-54. Thus was created a personal debt due from the railroad debtor secured by a general lien on all of its property within the state.

The assessment liens of the City of New York, here in question, do not arise out of a personal obligation or debt of the Railroad but consist solely of specific liens upon the several parcels of its real property against which the assessments were levied. They are not and never were general liens upon all of the real property of the Railroad. They were not at any time liens upon the revenues or personal property of the Railroad. Nor were they levied in the first instance as franchise taxes in connection with the operation of the Railroad. They were levied as assessment liens impartially on all real property benefited by the local assessment proceedings.

This distinction in fact is all important. It must be borne in mind that the State of New Jersey had a tax *claim* based upon an *in personam* debt due and owing from the railroad company which was secured by a general lien. As a holder of a tax claim, clearly it was a creditor within the meaning of § 77. The *Gardner* opinion correctly held "that the reorganization court had jurisdiction over the proof and allowance of the tax claims" of the State of New Jersey and that they were required to be filed within the time fixed under § 77(c)(7) (pp. 572-573). The "*dictum*" in the *Gardner* case upon which the Courts below relied must be read in the light of the fact that this Court was then discussing tax *claims* and not tax *liens*.

In this connection it is significant that in its brief to this Court, the State of New Jersey specifically stated (*Gardner* v. *New Jersey*, unofficially reported in 91 L. Ed. 504, 510):

> "The filing of the proofs of claim merely constituted notice to the trustees of the existence of the state's tax liens and laid the basis, in the event of the applicability of § 64, for making a claim in the event the liened property was insufficient to pay in full the taxes and interest due the said state."

This statement of position was not controverted by the Court. If the State of New Jersey had not filed claims in the *Gardner* case, the only effect of the failure to file would have been to restrict it in the recovery of its taxes to levy upon the railroad's property within the State of New Jersey; it could not have participated as a general creditor in any of the other assets of the railroad, wherever they might be. In other words, by filing a notice of claim for the taxes due it as a debt from the railroad, the State of New Jersey was using "a traditional method of collecting a debt" and was subjecting itself to the consequences following upon that procedure. *Gardner* v. *New Jersey*, 329 U. S. 565, 573 (1947).

However, in that portion of the opinion which discussed the reorganization court's jurisdiction over New Jersey's tax liens (*id.*, pp. 575-578), the only conclusion reached was that the Court had "jurisdiction over all of the property of the debtor, including that on which New Jersey asserts a lien, and the power of the Court to deal with liens extends to the lien which New Jersey claims" (*id.*, p. 578). But the *Gardner* opinion did not hold that the power of the reorganization court to ascertain the validity and extent of such liens, the method of their liquidation or the extent of their relative priorities, included the right to cut off and bar such liens by a general notice to creditors to file *claims*. On the contrary, it specifically held that "valid

liens existing at the commencement of bankruptcy proceedings have always been preserved" (*id.*, p. 576). Implicit in the opinion, therefore, is the underlying recognition that whenever a bankruptcy or reorganization court seeks to assert its jurisdiction over tax liens, such jurisdiction must be exercised upon specific notice to the taxing authority unless it has already voluntarily appeared in the proceeding.

This broad power to deal with tax liens was based upon the obvious necessity of preventing a state from asserting a broad general lien of the type owned by New Jersey in such a manner as to "pull out chunks" of the estate from the reorganization court and thus obstruct the operation of the railroad (*id.*, p. 577). In contradistinction, it should be noted that the enforcement of the City's assessment liens could never achieve such a result. These assessment liens are levied by the City of New York only against specific parcels of real property which are deemed to have been benefited by a local improvement. Such assessments may not be made against a railroad's right of way but have been upheld against parcels of railroad property which were subsidiary in nature. *Matter of City of New York (Juniper Avenue)*, 233 N. Y. 387, 392-393 (1922).

Thus, foreclosure of such a lien could not disrupt the continuous operation of the railroad and would not result in its "being divided up and dismembered piecemeal." *Gardner* v. *New Jersey*, 329 U. S. 565, 577 (1947). If the reason for the grant of power to the reorganization court to deal with tax liens of a general nature rests upon the necessity in the public interest of safeguarding the railroad entity, the necessity for the application of this power to the City's assessment liens disappears. Moreover, if it be true that the assertion of jurisdiction over a general tax lien must be exercised on specific notice, then *a fortiori*, there is need for specific notice in the case of an attempt to exercise jurisdiction over a specific tax lien which in no

way affects the overall operation of the railroad debtor.*

This analysis of the *Gardner* case demonstrates that the opinion of the Courts below is based upon language which was not and could not have been intended to apply to the situation here presented. At no time during the course of the reorganization of the Railroad was the District Court asked to assert its jurisdiction over the City's assessment liens with respect to any of the matters into which, in line with the *Gardner* case, it could validly inquire. The order which the District Court signed early in the proceedings requiring the filing of claims and which was directed generally to all creditors (R. 39-41), in no way affected the rights of the City of New York.

It must be remembered that under no circumstances could the City of New York look to other property of the Debtor in payment of any particular assessment lien in the event that the specific parcel levied upon proved insufficient in value to satisfy the amount of the lien. Obviously, therefore, the City of New York does not stand in the position of a secured creditor, such as the State of New Jersey was in the *Gardner* case, with a tax claim or debt secured by a lien. We had no claim against the general assets of the Railroad which we could protect by proving and filing. We had no right to share as a creditor in the redistribution or reorganization of the Railroad's assets. The filing of a notice of claim would have been a futile act. It would have accomplished no more toward payment of the City's assessment liens than was already provided in Order No. 1 (R. 42), in which, at the very inception of the proceedings, the payment of taxes and assessments then due was directed. Thus, it is apparent that the filing of a proof

* While the Debtor has informed this Court that it has always taken the position that these assessment liens were invalidly imposed, we emphasize again that in the Courts below the validity of these liens was assumed. It must necessarily be assumed as well, therefore, that these liens were not imposed upon such portions of the Railroad's real property which constituted part of its right of way.

of claim would have given the City of New York no greater rights than it already had with respect to the payment of its assessment liens.

Before leaving this discussion of the *Gardner* case, it should be pointed out that the record on appeal to this Court in that case discloses that the original petition asking for reorganization under § 77 *expressly* referred to the taxes due to the State of New Jersey as a major reason for the necessity for reorganization (*Gardner* record, pp. 192-193). It was not contended below that the petition for reorganization of the respondent made any specific reference to tax claims or, for that matter, tax liens.

Furthermore, Order No. 1 in the *Gardner* case, which approved the petition, specifically prohibited the debtor from making any payment on account of taxes, assessments or other governmental charges, state or local, due or to become due, and whether theretofore or thereafter assessed upon its property or any part thereof in New Jersey, without further order of the Court (*id.*, p. 196). At the very inception of the *Gardner* proceeding, therefore, it was apparent that the validity of the taxes due the State of New Jersey was under attack. The third order of the Court, entered upon the personal appearance of the Attorney General of the State of New Jersey, restrained him and his successors from entering judgment on and issuing execution for the collection of taxes until the entry of the final decree or further order of the Court (*id.*, p. 195).

No such procedure was followed in the reorganization of the respondent. No order was ever served on the City of New York to show cause why the enforcement and collection of its assessment liens should not be restrained and no order of restraint was ever signed. On the contrary, the first order of the District Court authorized the Debtor, in its discretion, until further order of the Court, to pay all taxes and assessments already due without any restrictions whatsoever upon this direction (R. 42).

(5)

Since the City, as holder of these assessment liens, was not a creditor of the Debtor within § 77 of the Bankruptcy Act, the order requiring the filing of claims directed to creditors of the Debtor did not affect the City. In consequence, the Courts below erred in discharging the City's liens simply because the City did not comply with this order.

POINT II

When the Debtor went into reorganization in 1935, nothing in the Bankruptcy Act as it then existed required the City to file a claim or to take any affirmative action in preservation of its liens.

When the reorganization proceedings of the Debtor were instituted, and even at the time when the order directing general notice to creditors to file proofs of claim was signed (Order No. 32, R. 39-41), § 64 of the Bankruptcy Act as it then existed (prior to the amendment made thereto by the Chandler Act in 1938), put upon the trustee the affirmative duty of searching out and paying all taxes legally due and owing, without distinction between the state and federal governments. *De Laney* v. *City and County of Denver*, 185 F. 2d 246, 249 (U. S. C. A., 10th Cir., 1950). This Court has reserved decision on whether § 64 is applicable in reorganizations under § 77 because, it was said, § 77 alone is adequate to sustain the asserted jurisdiction of the reorganization court over all the property of the debtor. *Gardner* v. *New Jersey*, 329 U. S. 565, 578, n. 7 (1947). See also *Lyford* v. *City of New York*, 137 F. 2d 782, 785-786 (C. C. A., 2d Cir., 1943).

If § 64 *was* applicable to these proceedings when instituted, then clearly the City of New York was justified in relying upon the provisions of that section in expectation of payment or preservation of its assessment liens, *unless* the validity of its liens was called into question by some

affirmative action of the Court or the Trustees. Whatever changes were made to § 64 by the Chandler Act ought not to affect the argument above made. The City's liens had vested prior to its passage and nothing in the Chandler Act indicates a Congressional intent to construe it retrospectively. *Ginsberg* v. *Linder*, 107 F. 2d 721, 726 (C. C. A., 8th Cir., 1939).

If § 64 was *not* applicable to these proceedings when instituted, then the City of New York was justified in relying upon the provisions of the first order signed by the District Court in the reorganization proceedings authorizing the Trustees without more, in their discretion, to pay "all taxes and assessments *due* or to become due upon the properties, income, franchises or business of the Debtor" (R 42; emphasis supplied).

In either event, the City of New York was under no obligation to file a notice of claim or to take any affirmative action in preservation of its liens. It had a right to expect that its assessment liens would be paid or preserved. It necessarily had as well the reciprocal right to expect specific notice of any intention on the part of the Trustees to do otherwise.

The City's so-called failure to act in protection of its liens by not filing a proof of claim under the provisions of Order No. 32 cannot be construed as a waiver of its right to expect specific notice of an attack upon the validity of its liens. Much was made by the District Court and by the respondent of the fact that the City knew of the pendency of the railroad reorganization proceedings; but this is a far cry from saying that the City knew that the validity of its liens was under attack. It would be a strange rule of law which would require the City of New York, in protection of its specific real estate tax and assessment liens, to search the records of all bankruptcy and reorganization proceedings throughout the United States in order to preserve its liens by filing proofs of claim in every instance where the debtor owned real estate within the City.

The absurdity of such a rule of law is heightened when it is realized that our tax and assessment liens are imposed *in rem* and not *in personam* and that, in many instances, the City of New York does not even know who the owner of the property is. Even in those cases where tax bills are sent to a person who requests them, the person so requesting may be acting only as an agent for the true owner or may be a mortgagee or some other person interested in the payment of the taxes. The burden thus cast upon the City would require therefore that it also search the record for all last owners.

The fact of the matter is that it was never intended in this case to use the reorganization court as the forum for the determination of the validity of the City's assessment liens. This fact is expressly admitted by George H. Webster, the Railroad's Tax Agent. In his affidavit in support of the application to declare the City's assessment liens null and void, he states (R. 18):

> "* * * * it does not appear in any of the papers on file in the reorganization proceedings prior to the present petition that the liens of the City of New York were ever brought to the attention of the reorganization court, that said court ever passed on their validity or that said court had any knowledge of their existence; * * *"

The reason why these liens were never attacked in the reorganization court, he states, is that "it has always been and is the claim of petitioner and petitioner's trustees that the assessments set forth in Exhibit A attached to the petition herein were and are void as a matter of law" (R. 18).

It is thus clear that the question of the validity of the City's assessment liens was not raised during the pendency of the reorganization proceedings because the Debtor and its Trustees took the position that the liens were void *ab initio*. From the date of the original petition to the entry of the final decree, 12 years later, not *once* did the Trustees, their counsel or the Debtor apprise the District Court

of the existence of the City's assessment liens, much less ask the Court to pass upon their validity. Three years after the final decree, the Railroad for the *first* time, informed the District Court that these liens existed and asked that court to rule that they had been discharged. The District Court held that the liens were discharged, not because of initial invalidity in their imposition, but because of the failure of the City to file a claim in the reorganization proceedings. In short, through the medium of what appears clearly to have been a deliberate, though secret, plan on the Railroad's part, the City is barred from asserting its liens. In effect, the District Court unwittingly lent its aid to this scheme and device.

The entire conduct of the Debtor and its Trustees throughout this proceeding is consistent with the position above stated by Mr. Webster. The statement of assets and liabilities which Order No. 1 of the District Court required the Debtor to file on or before November 30, 1935 (R. 45), made in pursuance of the provisions of § 77(c) (4), admittedly never set forth the City's assessment liens (R. 20). What is more significant is that the Debtor never included among its liabilities *any* tax liabilities which existed prior to the inception of the reorganization proceedings (*ibid.*). Obviously, the Debtor recognized that under the provisions of Order No. 1 it was required to pay tax liabilities which were then due and owing.

Whether or not the Railroad, before entering into reorganization, was justified in taking the position that the assessment liens in question were invalid and therefore did not have to be paid, that position was not one which the Trustees as officers of the Court could maintain. Faced with the affirmative duty to pay taxes and assessments pursuant to the provisions of Order No. 1 in the reorganization proceedings, they had no right to adopt the position of the Railroad in respect to the validity of the City's assessment liens and remain silent. They were required to pay these liens or to petition the reorganization court for an adjudication as to their legality. Obviously, if such an appli-

cation had been made, the City of New York would have received adequate notice thereof and would have been given ample opportunity to be heard in defense of the legality of its liens. By the Trustees' failure to take such steps, by their deliberate concealment from the Court and from the Interstate Commerce Commission of the very existence of the City's liens, they permitted the reorganization to be consummated without any adjudication on the matter. Thus, the validity of the assessment liens of the City of New York was decided by the private opinion of the Railroad. It is inconceivable that this Court will countenance this arrogation of the judicial process.

POINT III

Assuming *arguendo* (1) that the City *was* a creditor of the Debtor Railroad and (2) that it might have been required in a proper case to file a claim for its assessment liens, the City has been deprived of its property without due process of law if its liens were discharged simply by reason of its failure to file a claim as required by a general order of the District Court of which, at most, it received constructive notice by publication only. As a creditor whose name, address and interest were known to the Debtor, the reasonable notice required by the statute to be given to the City was not provided by the order and publication referred to, neither of which named the City.

The courts below have held in effect that the City of New York was a creditor required to comply with the provisions of Order No. 32 of the District Court in which the Court set the time in which claims were to be filed. Because the City of New York did not file a claim, it has been held that it is barred from participating in the reorganization proceedings and its liens have been forever discharged. We submit that the result below rests upon a total disre-

gard of the notice requirements of § 77, which, as Judge FRANK pointed out in his dissenting opinion below, were designed for the protection of creditors. *In Re N. Y., N. H. & H. R. Co.*, 197 F. 2d 428, 429 (U. S. C. A., 2d Cir., 1952) (R. 96).

It is readily demonstrable that the error below was based upon a failure to comply at the outset with the provisions of § 77 (c) (4). That subdivision requires the District Court to direct "the trustees * * * to file with the court a list of all *known* * * * creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each * * * creditor * * *" (emphasis supplied). The District Court never directed the filing of such a list. In fact, no list was ever filed containing the name of the City or referring to its assessment liens, although the respondent freely admits that the Debtor and the Trustees knew about them (R. 18). When the District Court ordered notice to creditors of the time within which they were required to file claims, it compounded its original error of failing to require the Trustees to file a list of all known creditors. By providing that notice of its bar order be given (1) by mail to creditors who had entered appearances up to that date and to the mortgage trustees (whose liens were obviously junior to those of the City), and (2) by publication to all other creditors whether known or unknown, the District Court did not direct or provide that notice by mail be given to all creditors whose names and addresses were known to the Debtor.

As far as notice of the bar order was concerned, therefore, the District Court provided for notice by mail to "appearing" creditors rather than to "known" creditors. While it is true that § 77(c)(8) requires only that "reasonable notice of the period in which claims may be filed, * * * be given to creditors * * * " and does not in terms refer to "known" creditors as contrasted to "appearing" creditors, it is not by accident that the provision for a list of "known" creditors contained in § 77(c)(4) precedes § 77(c)(8). The

Congress obviously intended that the District Court should cause appropriate notice to be given to all "known" creditors, and that such notice would be different from that given to unknown creditors.*

The nub of the problem therefore is what may be done in the District Court when the statute requires that reasonable notice be given. Certainly, whether or not a creditor is entitled to more than constructive notice by publication of an order requiring it to file claims should not be made to rest upon a distinction between appearing and non-appearing creditors. Such a distinction runs contrary to the requirement for the giving of reasonable notice. Obviously, it is not the creditor who has appeared who is most in need of notice of the bar order; it is the creditor who has not appeared, such as the City, who needs the notice prescribed by the statute of the period limited for filing claims.

The giving of notice by publication is a legal fiction, resorted to only in those cases where it is not reasonably possible or practicable to give more adequate warning. *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 317, 320 (1949). This Court has not hesitated to strike down as violative of due process a statute providing for service of notice by publication in circumstances where the person

---

* The respondent argued below that in any list of creditors which it would have prepared the City's name would have been omitted because the Debtor and its Trustees had from the entry of the first of these assessment liens disputed their validity (Railroad's Brief in Court of Appeals, pp. 32-33). This argument overlooks the clear instruction of the statute that such a list include *all* claims, whether admitted or not, since it specifically provides that "the contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise." § 77(c)(4). This argument did, however, lead Judge FRANK, below, to suspect "that the real reason behind the trustees' silence may just possibly have been that something would happen exactly like that which did happen here, *i.e.*, the City, not receiving notice of the bar order, would not file claims; its unfiled claims would be by-passed in the reorganization plan; and the new company would then assert that, after final decree, those claims were worthless" (R. 96).

sought to be notified was known to the moving party and could easily have been notified by mail. Exceptions to this rule, which in the *Mullane* case were noted and approved (339 U. S. pp. 316-317), present situations which do not parallel the facts at bar. The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane* v. *Central Hanover Trust Co., supra*, p. 314.

Quite appropriate to the circumstances of this case is the language which was used by this Court in the *Mullane* opinion (339 U. S., at p. 315):

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. * * *
>
> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." *

* Order No. 32 provided for notice of its terms by mail to the Railroad's mortgage trustees. It is crystal clear that notice to the

Although the City did not receive the reasonable notice of the bar order required by the statute, the Courts below have held that the constructive notice afforded by the publication of the bar order was sufficient to foreclose the City from asserting its rights under its assessment liens. This holding was made despite the fact that neither the bar order nor the published notice named the City. The holding of the Courts below was based upon the bare fact that the City knew that the Railroad was going through reorganization. There is, of course, complete absence of proof that the City knew of the existence of the bar order or that its terms were intended to affect the assessment liens.

The burden which the decision of the Courts below thus casts upon the City of New York is unsupportable. The

---

same degree, *at the very least*, should have been given to tax lienors like the City of New York, whose liens are unquestionably paramount to the mortgage liens. Instead, however, Order No. 32, without naming The City of New York, provided for publication of the notice in The New Haven Journal Courier, The Hartford Daily Courant, The Boston Herald, The Providence Journal and The Wall Street Journal. Moreover, the notice as published did not name The City of New York. The first four of these newspapers are listed in N. W. AYER & SONS, *Directory of Newspapers and Periodicals* for 1935 and 1936, as daily newspapers of general circulation. The Wall Street Journal is listed as a daily *financial periodical*. In 1935, the circulation of the Wall Street Journal was 28,537. The United States official census figures for the population of New York City for the year 1930 were 6,930,446. Thus, the circulation of this financial periodical reached approximately 0.4% of the population of The City of New York. Contrasted with this percentage figure of circulation the other newspapers in which publication was provided had circulations which bore far greater proportions to the population of the cities in which they were published, as indicated in the following table:

Newspaper	*1935 Circulation*	*U. S. Census (1930)*	*Ratio of Circulation to Population*
New Haven Journal-Courier	17,613	162,655	10.8%
Hartford Daily Courant	36,088	164,072	22 %
Boston Herald	119,647	781,188	15.3%
Providence Journal	41,556	252,981	16.4%

Similar results would follow from an analysis of the 1936 circulation figures. Thus, the complete inefficacy of the constructive notice here relied upon is demonstrated.

effect of the decision is that whenever the City of New York learns in some fashion, however fortuitous, that a railroad is going through reorganization somewhere within the territorial jurisdiction of any of the Federal Courts, the City of New York is charged with the affirmative duty of searching the files of each and every such reorganization proceeding to find out if the interests of the City of New York are in any way affected thereby. What is more, the City must also search the titles of each parcel of real property in the City of New York * to determine whether any of such parcels are owned by railroads going through reorganization. As we have already pointed out, the City does not and is not required to have a system by which it can tell who are the proper owners of each piece of land against which local assessments and real estate taxes may be laid. Where, as here, the Debtor's Trustees had only to include the City of New York in the list of known creditors to be notified of the bar order by mail, it seems pointless to insist that the fiction of constructive notice should be carried to the extremes above outlined.

Aside from the impracticality of the course of conduct which the lower Courts' decision requires, the decision below creates a situation which is manifestly unjust. The City of New York knew of the proceedings, it is true, but it may also be assumed that it knew that the statute entitled it to reasonable notice of a bar order. It had every right, therefore, to wait to file its claim until it received such a notice, particularly since the Debtor knew of its existence.

Nowhere in § 77 is there contained a specific statutory provision imputing knowledge of the bar order to anyone having mere knowledge of the reorganization proceedings. To hold that such knowledge of the pendency of the reorganization proceedings, without more, constitutes knowl-

* There are approximately 840,000 separately assessed parcels of real property in the City of New York. *Annual Report of the Tax Commission and the Tax Department to the Mayor of the City of New York*, September 12, 1952, pp. 14-15.

edge of a notice to file claims on pain of being barred for failure to file, is as obvious a deprivation of property without due process as may be imagined.

This is, then, a case where a debtor, by its own admission, has pursued a course of conduct deliberately intended to foreclose the rights of the creditor with no judicial inquiry whatsoever into the validity or invalidity of the creditor's claim. With knowledge of the City's claim and, of course, of the name and whereabouts of the City, the Debtor chose, instead of the simple expedient of notifying the City by mail, to conceal from the Court in every stage of this proceeding the fact that the City of New York had a claim against the Railroad. As against this barefaced insistence upon a highly technical interpretation of a complicated statute without moral or equitable support therefor, a consideration of the equities sustaining the City's position points inevitably to the conclusion that justice will be done in this case only if the City's liens are permitted to continue in existence.

For one thing, even if the City had had full knowledge of the proceedings and of every step taken therein, it had every reason to believe that it need not file claims for its tax liens, bar order or no. The necessity for filing such claim is raised for the first time in this proceeding.

Presumably, the Debtor and its Trustees were equally aware of the open status of this question. With this awareness it seems obvious that the proper way to have determined the question would have been on specific notice to the City.

Secondly, there is every reason to believe that the provisions of the Plan of Reorganization of this Debtor were not intended to affect the City's liens. We do, in fact, argue in Point IV, *infra*, that the proceedings had in reorganization of the Railroad were not intended to and did not materially or adversely affect the City's liens. Of course, if that was the actual intent of the Plan of Reorganization, then the City's liens must necessarily be saved. But even if this was not the actual intent, certainly there was enough

to cause the City to conclude quite reasonably that such was the Plan's apparent intent. As Judge FRANK, in his dissenting opinion below, observed (197 F. 2d, p. 434; R. 105):

> "In any case, whatever the proper construction of the plan, the questions were close enough, I think, to excuse the City from jumping from the knowledge of the proceedings to the knowledge that it must file a claim. How much trouble would have been saved if the judge in accord with the statute, had only directed the trustees to mail notices to all known creditors to file their claims."

POINT IV

Assuming *arguendo* that without specific notice to the City a Plan of Reorganization might have been adopted affecting the City's assesssment liens, the record shows that the proceedings had in reorganization of the Railroad, the Plan of Reorganization certified by the Interstate Commerce Commission, and the Consummation Order and Final Decree were not intended to and did not materially or adversely affect such liens.

The argument under Points I to III inclusive proceeded on the alternative assumptions that the City was or was not a creditor within the terms of § 77. The discussion under this point is not related to those assumptions but develops an argument based on the factual record of the proceedings to reorganize the Railroad Debtor; *i.e.*, that the City's assessment liens were not intended to be affected thereby.

No statement or indication of intent to bring the tax liens of the City of New York within the scope of the reorganization will be found in the voluminous record of the proceedings to reorganize the New York, New Haven and Hartford Railroad Company. On the contrary, it is quite clear from the affidavit of George H. Webster, the

Railroad's Tax Agent, that the District Court and the Interstate Commerce Commission were never apprised of the existence of these liens (R. 18). What is more significant is that at every stage of the reorganization proceedings pre-existing tax liabilities were recognized as obligations to be paid in full, or, if not paid, assumed by the reorganized Debtor.

The validity of the City's assessment liens was never attacked in the reorganization proceedings. Accordingly, it must be assumed, as was done by the Courts below, that for all purposes in connection with this application, these assessment liens were valid (R. 82). Consequently, if it may be demonstrated that pre-bankruptcy taxes and assessments were not intended to be materially and adversely affected by the Plan of Reorganization, it necessarily follows that the City's assessment liens have also been preserved.

Order No. 1, approving the petition in reorganization of the respondent, recognized the duty and obligation of the Debtor to pay taxes and assessments which had theretofore become due (R. 42). Thus, from the very outset, the Debtor and its Trustees, in their discretion, were specifically authorized to pay *all taxes and assessments due upon the properties of the Debtor*. This was obviously interpreted by the Debtor itself to mean that pre-existing tax liabilities were not to be affected by the Plan of Reorganization because the statement of assets and liabilities which it filed in the reorganization proceedings did not include pre-existing tax liabilities (R. 20). Only by further order of the Court could the payment of pre-existing tax liabilities be enjoined (R. 42). It may be noted here that at no stage of the proceedings was any further order of the District Court made enjoining the payment of the City's assessment liens.

In the Courts below, the City of New York pointed out that the provisions regarding notice contained in Order No. 1 (R. 46-47) called for notice of the provisions of said

order to be given by mail to the mortgage trustees, and by publication only to "its creditors and stockholders." Order No. 32 (the bar order) directed that notice of the order be given by mail to the mortgage trustees and "to such others as have entered their appearances herein" and by publication to its other creditors (R. 41). We argued that these notice provisions, read together with the requirement in Order No. 1 that taxes and assessments already due be paid, imported an intent to leave pre-existing tax liens undisturbed. Since tax liens are unquestionably paramount to mortgage liens, it seems obvious that, had it been intended to materially or adversely affect pre-existing tax liens by the reorganization proceedings, notice at least equal to that given to the mortgagees would have been provided.

The Courts below rejected this argument on the ground that "it would be preposterous to construe the substantive provisions of a plan confirmed in 1945 by reference to the terms of an *ex parte* administrative order of notice entered in 1936 before any plan at all had been formulated." 105 F. Supp., at p. 418 (R. 87). We respectfully submit that the lower Courts failed to realize the full implications of Order No. 1, in which the Debtor was specifically authorized to pay all taxes and assessments which had theretofore become due. The plain language of the order required the Debtor to pay assessments of the character here involved and we submit that the District Court's characterization of that construction as preposterous is certainly unwarranted.

We also pointed to the provisions of Order No. 736, dated March 13, 1944, which set up a classification of creditors and stockholders and which nowhere among such classes made provision for inclusion of the assessment liens of the City of New York (R. 50-54). This, too, we contended, was a demonstration of lack of intent materially and adversely to affect the City's assessment liens. An examination of the classification of creditors and stockholders will

quickly reveal that the highest type of creditors classified therein were mortgagees (*ibid.*). We would not expect to find tax liabilities which accrued during the reorganization proceedings in this classification because they were administration expenses which had to be paid; but if pre-existing tax liabilities had been intended to be affected by the Plan of Reorganization, it seems obvious that a classification would have been set up for them. The absence of such a classification argues strongly for the proposition that pre-existing tax liens were intended to be recognized in full from the very inception of the reorganization proceedings.

This argument, too, the Courts below have rejected. The absence of any approved claim was seized upon as the real reason for not including the City in the classification (105 F. Supp., at p. 418; R. 87). But as we have already pointed out (*infra*, p. 35), the record strongly indicates that the real reason why the City's assessment liens and all other pre-existing tax liabilities were omitted from the classification was that they were not intended to be adversely affected by the reorganization proceedings.

Furthermore, Order No. 736 furnishes additional evidence of the District Court's failure to comprehend fully the scope of the proceedings which were before it and the requirements of § 77 under which it acted. It will be seen from the provisions of Order No. 736 that, after approving a classification of creditors and stockholders, the Court ordered a transmission to the Interstate Commerce Commission of "lists of all known stockholders and *creditors* of the debtors *herein included* in any of the foregoing classes, * * * and the debtors' trustees within said time [60 days from the date of Order No. 736] shall file said lists herein" (R. 53-54; emphasis supplied). The time for filing the lists of the known stockholders and creditors was extended to June 12, 1944 by Order No. 736A (R. 54). These lists of creditors and stockholders, as finally submitted by the Trustees on June 10, 1944, did not contain the name of the City of New York (R. 62-63).

In requiring the Trustees to file lists of only those creditors included in the order of classification, the District Court erred in limiting the required list of creditors to those who had already filed claims. It is clear from the provisions of § 77 that the list of creditors which the Debtor is required to file has no relation to whether or not the creditors have or have not filed claims.

Section 77(c)(4) provides that the judge shall require the officers of the debtor or trustee to file, among other things, a list of all *known* bondholders and creditors of the debtor in lieu of the schedules required by § 7 "of this Act". This subdivision also provides that the contents of such lists shall not constitute admissions by the debtor or the trustees. It is thus obvious that "known" creditors does not mean creditors who have filed claims.

It is submitted that the statute did not intend that the Trustees could wait until claims had been filed before drawing up a list of known creditors and then limiting that list to creditors who had already filed claims. It should not be forgotten that the provisions of § 77(c)(4) bear the same relation to proceedings under § 77 as the provisions of § 7 bear to ordinary bankruptcies. Just as in ordinary bankruptcies the filing of a list of creditors precedes the filing of notices of claims, so, too, in § 77 proceedings the filing of a list of "known" creditors under § 77(c)(4) should precede the fixing of a reasonable time within which claims may be filed and notice thereof given under § 77(c)(7), (8). Our insistence upon this chronology of procedure is not specious; if the District Court had required the filing of the list of known creditors and stockholders at the time when § 77 required it to be filed, that list would have been submitted by the Debtor in advance of expiration of the period for filing of claims. If the list, under such circumstances, would still have omitted the name of the City of New York, it would then have been perfectly clear that the City was not to be considered as a creditor and that its

assessment liens were not to be affected by the Plan of Reorganization.

Further evidence of lack of intent to materially or adversely affect the City's pre-existing tax liens is contained in the first report of the Interstate Commerce Commission approving the original Plan of Reorganization. This report stated that the Plan should provide for the satisfaction of (a) current liabilities of the Debtor incurred in the ordinary conduct of its business *prior* to the institution of the reorganization proceedings which were entitled to priority over any mortgages of the Debtor; (b) current liabilities and obligations of the bankruptcy trustees incurred during the reorganization proceedings; (c) expenses of reorganization allowed by the Court; and (d) claims for interest and principal not paid at maturity because not presented for payment (R. 48).

It will be observed that this portion of the report makes provision for payments in a manner similar to the provisions of § 64 of the Bankruptcy Act. The report speaks of liabilities incurred in the conduct of business, expenses of reorganization and claims for interest and principal. These are debts and do not include tax liens. It follows, consequently, that what the Interstate Commerce Commission had in mind was the establishment of a system of priorities in payment of debts. But there is no indication here or elsewhere in the report that there was any intention to disturb the validity of pre-existing tax liens.

Furthermore, Section L of the Plan provided as follows (R. 71):

> "Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

The end result of the reorganization proceedings was the deed conveying all of the Debtor's property from the Trustees to the respondent, the reorganized Debtor (R. 29-30). This conveyance dated September 18, 1947 was executed in compliance with the Consummation Order and Final Decree of the District Court, which also approved the form of the deed (Order No. 1007; R. 30-31). Significantly, this conveyance was made "subject to the liens of taxes and assessments lawfully levied or assessed against" the real property conveyed (R. 30). This language is consistent with the contention of the City that pre-existing tax liabilities were not intended to be affected by the reorganization.

CONCLUSION

The judgment of the Court of Appeals should be reversed, the order and decree of the District Court vacated, and the cause remanded for further proceedings not inconsistent with the declaration that the assessment liens of the City of New York, set forth in Exhibit A attached to the petition herein, are and continue to be valid and subsisting liens.

December 3, 1952.

Respectfully submitted,

DENIS M. HURLEY,
Corporation Counsel,
Counsel for Petitioner,
The City of New York.

SEYMOUR B. QUEL,
HARRY E. O'DONNELL,
MEYER SCHEPS,
ANTHONY CURRERI,
of Counsel.

APPENDIX

Section 57 (n) of the National Bankruptcy Act (11 U. S. Code, § 93 [n]; as enacted June 22, 1938, 52 Stat. 867, Chap. 575, read as follows:

"n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: *Provided further,* That, except in proceedings under chapters X, XI, XII, and XIII of this Act, the right of infants and insane persons without guardians, without notice of the bankruptcy proceedings, may continue six months longer: *And provided further,* That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case."

Section 64, subdivision a of the National Bankruptcy Act (11 U. S. Code, § 104), as it existed prior to October 23, 1937 (the date of the filing of the petition in reorganiza-

"§ 64. Debts which have priority. (a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in the order of priority as set forth in paragraph (b) hereof: *Provided*, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

Section 64, subdivision a, of the National Bankruptcy Act (11 U. S. Code, § 104), as amended June 22, 1938, 52 Stat. 874, Chap. 575, read as follows:

"Sec. 64. Debts Which Have Priority.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, serv-

or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States in * entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however*, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

Section 67, subdivision b, of the National Bankruptcy Act (11 U. S. Code, § 107), as enacted June 22, 1938, 52 Stat. 876-877, Chap. 575, read as follows:

"b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against

the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of the property, they shall instead be perfected by filing notice thereof with the court."

Section 67, subdivision d, of the National Bankruptcy Act (11 U. S. Code, § 107), as it existed on October 23, 1935 (the date of the filing of the petition in reorganization), read as follows:

"(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein."

Section 77(b) of the National Bankruptcy Act (11 U. S. Code, § 205), enacted March 3, 1933, 47 Stat. 1475, Chap. 204, read in part as follows:

"The term 'creditor' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this title."

Section 77(b) of the National Bankruptcy Act (11 U. S. Code, § 205), as amended August 27, 1935, 49 Stat. 913,

"The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Section 77(c)(4) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 915, Chap. 774, reads as follows:

"(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 25 of this title, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise."

Section 77(c)(7) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 915-916, Chap. 774, reads as follows:

"(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors

not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization."

Section 77(c)(8) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 916, Chap. 774, reads as follows:

"(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses, to be given creditors and stockholders by publication or otherwise."

Section 77(l) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 922, Chap. 774, reads as follows:

"(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered

Supreme Court of the United States

OCTOBER TERM, 1952

No. 203

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONER'S REPLY BRIEF

DENIS M. HURLEY,
Corporation Counsel of the City of New York,
Municipal Building,
New York, N. Y.

SEYMOUR B. QUEL,
HAROLD E. O'DONNELL,
PETER SCHEPS,
ANTHONY CURRERI,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1952

No. 203

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
against
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

(1)

In Point II of its brief, the Railroad reveals that it is subject to the confusion which results from the failure to distinguish clearly between (1) a tax lien on real property, (2) a tax lien on personal property, and (3) a tax unaccompanied by any lien and enforceable only as a debt due from the bankrupt. In our opinion, our main brief (Petitioner's Br., pp. 13-15) has dispelled that confusion and no purpose would be served by repeating what was there said. The conclusions we reached are reinforced by the analysis of Sections 67 and 64a contained in REMINGTON, *Bankruptcy*, 5th ed., Vol. 6, §§ 2825, 2833. Once the distinction between a tax claim which must be filed under

§ 57n, and a statutory lien for taxes which is protected by § 67 (b) is understood, it becomes clear that the position taken by the City in this proceeding is valid; i.e., that statutory tax liens may not be discharged by failure of the taxing authority to comply with a general order requiring the filing of claims.

(2)

Under Point III of its brief, the Railroad claims that the second question presented by the City in its petition for certiorari was not raised until that time, and therefore has been eliminated from consideration by this Court. The question referred to was whether the notice by publication to file claims was a reasonable notice to the City under § 77 (c) (8), in view of the fact that the Railroad knew the City's name, interest and whereabouts and could easily have notified it by mail to file its claim.

Contrary to the Railroad's assertion, this question was raised in the lower Courts. We pointed out to the District Court in our reply brief that the Railroad was seeking to bar our liens without ever having brought their existence to the attention of the Court. We had never been listed as creditors, whether disputed or not, as required by § 77 (c) (4).

As the decision of the District Court indicates (R. 91), we did advance the contention that the City would be deprived of its liens without due process if the Court were to hold that we were barred by our failure to file a claim because of the provisions of Order No. 32 (See also, R. 37-38, Par. 42). Since the majority of the Court of Appeals adopted the opinion of the District Court, the question was necessarily before the former and considered by it. Furthermore, the dissenting opinion of Judge FRANK placed great stress upon the failure to comply with the requirements of §§ 77 (c) (4) and 77 (c) (8) (R. 96-104). It is proper to assume, therefore, that the several judges who considered this matter passed upon the reasonableness of the notice which was provided for in Order No. 32.

In this connection the Railroad's brief (p. 24) refers to the affidavit of Meyer Scheps, counsel for the City, in an attempt to show that the City did not originally place its reliance upon a failure to receive a mailed notice, as an indication, we assume, that the question which we now seek to present to this Court was not presented below. This inference the Railroad captiously draws from a statement in Mr. Scheps' affidavit that "the City relied upon the Trustees' course of conduct" (R. 35). Obviously, part of the course of conduct upon which the City relied was the Trustees' failure to provide for the mailing to the City of a notice to file a claim. As the dissenting opinion of Judge FRANK points out, the statute expressly commanded the Court to give the City "reasonable notice" of the bar order, and as a creditor known to the debtor "that means notice by mail" (R. 100).

(3)

The remainder of Point III of the Railroad's brief (pp. 25-31) is devoted to an attempt to weaken the impact of the decision in *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1949), upon the proceeding at bar. All except one of the cases which the Railroad cites on the question of notice are cases decided before the *Mullane* decision. None of them passes upon the specific question decided in the *Mullane* case; i.e., that a notice by publication violates due process where the person sought to be reached by the notice and his whereabouts are known to the party required to give the notice. Those cases dealing with reorganization under § 77 and § 77B only support the proposition that the final order in the reorganization proceeding is binding on all interested parties. For example, while *Mohonk Realty Corporation* v. *Wise Shoe Stores*, 111 F. 2d 287 (C. C. A., 2d Cir., 1940), cited by respondent, held that a reorganization plan consummated under § 77B is binding even as against creditors who were never scheduled and who never knew of the proceedings, it did not hold that a creditor

whose name and whereabouts were known to the debtor, and who received no notice to file a claim except by publication, was so bound.

The one case which the respondent cites which came after the *Mullane* decision is *Standard Oil Co. v. New Jersey*, 341 U. S. 428 (1951) (Resp't's Br., p. 26). But there the statute prescribing notice by publication was upheld *because* the names and interests of the persons sought to be notified were unknown. Far from qualifying the doctrine announced in the *Mullane* case, the Court referred to that decision with approval and noted that the statute before it fell within one of the classes which, in the *Mullane* decision, it had held was a proper subject for notice by publication (341 U. S., at p. 434).

The lengths to which a debtor or its trustees in reorganization proceedings should go in order to determine the existence of lienors are dramatically illustrated in *Herbert V. Apartments Corp.* v. *Mortgage Guarantee Co.*, 98 F. 2d 662 (C. C. A., 3d Cir., 1938). There the debtor in Chapter X reorganization proceedings held property subject to the lien of a mortgage in which 212 participating certificate holders had an interest. The debtor, which did not know their names or addresses, was desirous of giving notice of the reorganization proceedings directly to the certificate holders. The District Court refused to make available to the debtor a list of the names and addresses of the lienors because of the opposition of the agent for 157 of the certificate holders, which claimed that it had a power of attorney to act directly for them. The Circuit Court, in reversing the order of the District Court, held that the certificate holders' rights would be substantially affected in the reorganization proceedings even though their claims were *in rem* and not *in personam*. It was held that the Court should exercise its discretion in the matter of notice in such a way as to carry out the Congressional intent which was to allow the debtor, its creditors, stockholders and claimants to establish a "concourse of interest which will avoid dismemberment of their respective rights." In directing that

the District Court should make the lists available to all creditors, stockholders and parties to the proceeding, the Court said, at page 667:

> "We think that Congress did not intend the provisions of 77B to operate in a kind of vacuum wherein information, ideas or proposed solutions relating to the difficulties of the reorganization may be kept from a substantial number of creditors."

(4)

The Railroad argues (Resp't's Br., p. 30) that the question of notice by publication or notice by mail becomes wholly immaterial because the City contends that it need not have filed a claim under any circumstances. If we are correct in our position that the Railroad was required by law to give the City notice more adequate than that afforded by publication, we fail to see how the Railroad's violation of the terms of the statute can be excused simply because the City might have taken the position that its assessment liens could in no way be affected by the reorganization proceedings. Furthermore, the Railroad assumes that the City would not have filed a claim even if it had received proper notice. This is not a valid assumption, since the City, following the dictates of ordinary prudence, undoubtedly would have filed a claim even though it might have contested the requirement to do so.

(5)

Finally, the Railroad attempts to excuse its failure to mail notice of Order No. 32 to the City by characterizing the City's assessment liens as "stale and invalid claims" (Resp't's Br., p. 31). This characterization is not in accord with the facts. The Railroad dealt with the City on a number of occasions during the reorganization proceedings and paid assessment liens similar in character and levied as part of the same proceedings as some of the liens here involved (R. 32-34). The Railroad asserts that these

payments were made only because they facilitated the payment of money due from the City in condemnation proceedings. But whatever the reason for the payments may have been, the fact that they were made shows that the City's liens were neither stale nor invalid. Indeed, if the Trustees had made payments on "stale and invalid" liens they would have been derelict in performing their duty.

Moreover, it should be noted that the last of the liens herein involved became a lien on January 25, 1930 (R. 26), less than six years prior to the inception of the reorganization proceeding. This is hardly a "stale" lien. As a matter of fact, one of the assessment liens similar to those here involved, which the Railroad paid while in reorganization, was entered December 31, 1909, thirty-two years before the date of its payment (R. 33). In any event, it should be pointed out that the so-called "staleness" of the City's liens is predicated solely upon the assertion that the City never made an attempt to enforce them. As a matter of law, no affirmative action is required of the City in order to preserve the vitality of its assessment liens. They are and remain liens until paid; they are a matter of record, and mere passage of time alone will not serve to destroy their validity.

---

* Note the inconsistency of this attitude. "Staleness" implies original validity and unenforcibility by passage of time. "Invalidity" connotes illegality from inception. In order to raise the claim of "staleness", the Railroad has receded from its position that the liens were void *ab initio*. We reemphasize, nevertheless, the fact that the validity of the imposition of these liens is not before this Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed, the order and decree of the District Court vacated, and the cause remanded for further proceedings not inconsistent with the declaration that the assessment liens of the City of New York, set forth in Exhibit A attached to the petition herein, are and continue to be valid and subsisting liens.

December 16, 1952.

Respectfully submitted,

DENIS M. HURLEY,
Corporation Counsel,
Counsel for Petitioner,
The City of New York.

SEYMOUR B. QUEL,
HARRY E. O'DONNELL,
MEYER SCHEPS,
ANTHONY CURRERI,
of Counsel.

(33850)

Supreme Court of the United States

No. 203—OCTOBER TERM, 1952

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor,

THE CITY OF NEW YORK,
Petitioner,
against
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO MODIFY JUDGMENT AND TO STAY MANDATE

DENIS M. HURLEY,
Corporation Counsel of the City of New York,
Municipal Building,
New York, N. Y.

SEYMOUR B. QUEL,
HARRY E. O'DONNELL,
MEYER SCHEPS,
ANTHONY CURRERI,
of Counsel.

Supreme Court of the United States

No. 203—OCTOBER TERM, 1952

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor,

THE CITY OF NEW YORK,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO MODIFY JUDGMENT AND TO STAY MANDATE

(1)

The respondent's present motion rests on what we believe to be a gross misconstruction of the opinion of this Court. The respondent professes to believe that this Court has held that the City's "failure to file any claim would have barred its claim had it received actual notice, by mail *or otherwise*, of the bar order." (Respondent's motion, pp. 1-2, emphasis supplied.) The respondent then suggests to the Court in its motion papers that the City may have had actual notice of the bar order other than by receiving

a mailed copy from the respondent. It further suggests that this Court would have affirmed the judgment below if the record had contained proof that the City had actual knowledge of the bar order.

The opinion of this Court did not suggest that if the City had, in some fortuitous manner, other than through the process of the District Court, acquired actual knowledge that Order No. 32 was in existence, the City would have been under an obligation to file a claim for its liens. On the contrary this Court said:

> "But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment."

The relief which the respondent sought was denied by this Court because of respondent's failure to give the City the "statutory 'reasonable notice'" to which the City was entitled. Respondent has never claimed that Order No. 32 was served upon the City of New York (other than by publication). Even now in its motion papers it does not suggest that such service actually occurred. It merely suggests that the City acquired knowledge of the existence of the bar order in some undisclosed manner in no way connected with the statutory requirements for the giving of notice. Since this Court has held that unless the City of New York received notice of the bar order pursuant to the provisions of the statute and through the process of the Court, whether or not the City knew that the bar order existed is entirely immaterial. It is as though a defendant in any action could be held bound to appear and defend therein even though service of a summons had not been made upon him simply because he knew that the plaintiff had prepared a summons and served it on a co-defendant.

Finally, we should like to point out, as we have all along, that neither Order No. 32 nor the published notice mentioned the City of New York by name. Even if some responsible official of the City of New York had by chance seen the published notice, or had read Order No. 32 in the files of the District Court, or had been told of the existence of Order No. 32 by the Trustees of the debtor, nothing contained in the order or in the notice of publication would have led the City to believe that it was intended to be affected thereby.

(2)

From what has been said we do not intend that it be implied that the City had actual knowledge of Order No. 32 during the pendency of the reorganization proceedings. Such an admission will nowhere be found in the record. The necessity for the City of New York to deny affirmatively that it had actual knowledge of Order No. 32 never arose. This was the result of the calculated position taken by the respondent throughout this entire proceeding.

At no time up to the present motion has respondent stated or even inferred that the petitioner had actual knowledge of Order No. 32. Its position rather has been that the City, having actual knowledge of the reorganization proceedings, was barred from asserting its assessment liens by reason of the service of the bar order upon the City of New York by publication. This position the respondent has consistently maintained at every stage of this proceeding—in its petition to the District Court (R. 3), the affidavit of its tax agent, Webster (R. 20), its brief in the Court of Appeals (pp. 15, 19), its brief to this Court in opposition to the petition for a writ of certiorari (pp. 13, 14), and its brief to this Court in this cause (pp. 7, 24, 25, 26-29). The respondent now seeks to abandon this heretofore consistently maintained position and advances a new theory for securing relief. It now attempts to maintain that the City's assessment

liens should be barred because the City of New York may have had actual knowledge of Order No. 32, knowledge which even now the respondent is unable to say that the City received under the provisions of the statute and pursuant to the process of the Court.

We believe we have demonstrated that the respondent's position is legally untenable. In addition, the respondent's present motion is simply an attempt to reopen this litigation upon a theory always available to it and deliberately ignored heretofore.

Furthermore, we think it a safe assumption that the respondent and its attorneys were always aware of the fact that notice by publication is a poor and sometimes a hopeless substitute for actual notice,* and if they could have relied upon actual notice, they would have done so at the outset. Our belief on that score is fortified by the fact that even on the present motion the respondent is careful to refrain from saying more than that it "has reason to believe that the City had actual notice of the bar order other than by receiving from respondent a mailed copy." That unsupported statement advanced at this late date is surely no ground for a modification. For, as we have already pointed out, this Court has made it clear that the determining fact is not whether notice has been acquired but whether there has been actual *service* of notice. Admittedly, the City of New York was never served with the bar order.

---

* We paraphrase the sentence of this Court's opinion herein, which reads: "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice."

CONCLUSION

The respondent's motion to modify the judgment of this Court and to stay its mandate should be denied.

February 9, 1953.

Respectfully submitted,

DENIS M. HURLEY,
Corporation Counsel,
Counsel for Petitioner,
The City of New York.

SEYMOUR B. QUEL,
HARRY E. O'DONNELL,
MEYER SCHEPS,
ANTHONY CURRERI,
of Counsel.

Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
—against—
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD R. BRUMLEY,
Counsel for Respondent,
Room 3841, Grand Central Terminal,
New York 17, N. Y.

ROBERT M. PEET,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
—against—
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the District Court (R. 103-116) is reported in 105 F. Supp. 413. The Court of Appeals for the Second Circuit affirmed upon the opinion of the court below, with one judge writing a dissenting opinion (R. 120-133). This is reported in 197 F. 2d 428.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition at page 4.

Question Presented.

The basic question presented for review is whether the courts below correctly decided that petitioner's pre-bankruptcy statutory liens on respondent's real property for unpaid assessments for public improvements were forever barred and discharged by petitioner's negligent or deliberate failure to take any steps in the bankruptcy court to establish and protect them during respondent's twelve-year reorganization, of which petitioner had actual knowledge, despite the existence of a published bar order requiring all creditors' claims to be filed in the bankruptcy court and petitioner's knowledge that respondent had always refused to pay these outstanding assessments or recognize their validity.

Statutes Involved.

The portions of Section 77 of the Bankruptcy Act (11 U. S. C. A., § 205) which are directly involved are printed in Appendix A, *infra*, pages 21-23.

Statement of the Case.

Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit is here sought to review the affirmance by that court of an order made in the United States District Court for the District of Connecticut granting the relief there requested by respondent.

The principal facts relied upon by respondent, The New York, New Haven and Hartford Railroad Company (hereinafter called the New Haven) in order to secure relief in the District Court against petitioner, The City

of New York (hereinafter called the City), are set forth below.

From 1894 to 1930 the City laid upon certain real property belonging to the New Haven in Bronx County a number of assessments for local improvements (R. 2, 7-17). The New Haven has refused to pay these assessments ever since they were laid, on the ground that they were void as a matter of law (R. 3, 19-20). The New Haven did not seek review of these assessments by means of the procedures provided for that purpose, because under New York law an assessment which is void as a matter of law remains void whether or not such review is obtained (R. 19-20). Under the law of New York, each assessment, insofar as valid and not void, became a first and prior lien in favor of the City against the specific real property upon which it was laid, until paid in full, but gave rise to no personal liability on the part of the New Haven (R. 2, 3, 30).

On October 23, 1935 proceedings for the reorganization of the New Haven under Section 77 of the National Bankruptcy Act were commenced in the United States District Court for the District of Connecticut (R. 2). Nearly twelve years later, on September 18, 1947, a consummation order and final decree concluding these reorganization proceedings became effective (R. 3).

Under the terms of Order No. 32 in these proceedings, issued on January 4, 1936 pursuant to Section 77 (c) (7) of the Bankruptcy Laws, claims of creditors of the New Haven were required to be filed or evidenced by May 1, 1936, and after that date no claim not so filed or evidenced might participate except on order for cause shown (R. 47). Under this order, creditors were directed to set forth in their claim the nature of any security for the claim and the facts with respect to any lien, priority or preferential classification claimed (R. 48). The terms of this order were published, among other places, in the

Wall Street Journal in New York City once a week for two consecutive weeks (R. 22, 48-49).

The City had actual notice of the New Haven's reorganization proceedings by June of 1936 or earlier, but never at any time has it filed or evidenced a claim for its unpaid assessments and the liens therefor or sought to intervene in the reorganization proceedings or petitioned for leave to file a claim (R. 22).

The assessed property has at all times been in the exclusive possession and control of the New Haven or its reorganization trustees (R. 2).

Nowhere in the plan of reorganization, the order confirming the plan, the consummation order and final decree, or the trustees' deed pursuant thereto is there any specific reference to the City's unpaid assessments (R. 68-77, 84-96, 20).

Section L of the plan of reorganization, the only section which could possibly apply to the City's claim, provided that claims against the debtor entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, were to be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of the debtor (R. 91). This section plainly referred only to claims filed in and approved by the bankruptcy court or specifically referred to in the plan.

The order confirming the plan made it binding upon all creditors, secured or unsecured, whether or not they were adversely affected by the plan, whether or not they filed claims, and whether or not they accepted the plan (R. 75-76). It further declared that the property dealt with by the plan, when transferred and conveyed to the re-

organized company pursuant to the plan, was to be free and clear of all claims of creditors and of all liens and encumbrances, except such as might be reserved in the plan, in this order or in the order of transfer and conveyance (R. 76).

The consummation order and final decree stated that upon the consummation date all the business, affairs, and entire property and estate of the debtor and its trustees were to vest in and become the absolute property of the reorganized company, free and clear of all claims, rights, demands, interest, liens and encumbrances of creditors of the debtor or its properties, except for those specifically referred to therein (R. 84). The consummation order released and discharged the debtor forever from all of its obligations, debts and liabilities, whether or not presented or allowed in the reorganization proceedings, and from all claims enforcible against its property, except those claims to be paid or assumed in accordance with the plan of reorganization (R. 84). The consummation order provided that all mortgages, bonds, notes, securities, obligations, debts and liabilities without limitation as to their nature, whether enforcible against the debtor or its property, were to become void and unenforcible against the reorganized company or its property, unless specifically provided for therein (R. 85). Finally, the consummation order contained a broad protective injunction to insure its enforcement that included a perpetual restraint against enforcing liens against the reorganized company's real property (R. 87-88).

The deed from the trustees of the debtor to the reorganized company transferred the real property held by the former free and clear of all claims, rights, demands, interests, liens and encumbrances of creditors except those imposed by the consummation order (R. 20).

Since September 18, 1947 when the consummation order went into effect the New Haven has repeatedly at-

tempted to sell, and to collect awards for the taking of, its real property in the Bronx free and clear of the City's pre-bankruptcy assessments and liens, but the City has refused to cancel any such assessments and liens of record without receiving payment in full, though requested to do so (R. 3).

In paragraph 2 of Section XI of the consummation order the bankruptcy court reserved jurisdiction in sub-paragraph (d) to consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the consummation order and to construe the plan of reorganization as to matters which may require construction, not dealt with in the consummation order, and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the plan of reorganization, the consummation order, and all other orders relative thereto previously issued (R. 88, 90).

The New Haven brought the present petition before the bankruptcy court to obtain instruction whether or not the plan of reorganization and the consummation order require the payment or assumption of any of the City's pre-bankruptcy assessments outstanding against the New Haven's real property in the Bronx, or make any reservations in favor of such assessments (R. 5). In the event that the court found that no such requirements or reservations existed, the New Haven asked the court to declare its real property subject to such assessments free and clear of all liens therefor, to restrain the City from enforcing or attempting to enforce these liens, and to direct the City to cancel of record all such assessments (R. 5).

The court granted the petition of the New Haven in all respects, finding no requirement or reservation favorable to the City in the plan of reorganization or the con-

summation order and granting the full declaratory, injunctive and mandatory relief requested (R. 97-98).

The Court of Appeals affirmed on the opinion of the court below, with one judge dissenting (R. 120-133).

Argument.

The City in its brief (pp. 12-15) advances as principal reasons for the granting of its petition that the decision sought to be reviewed raises important, undecided questions of federal law and is in conflict with decisions of courts of appeal for other circuits and of this Court. Neither ground has any merit. Furthermore, the decision below was manifestly correct.

(a)

No important, undecided question of federal law was decided by the court below.

That the terms "creditors" and "claims" in Section 77 (b), 11 U. S. C. A., § 205 (b), of the National Bankruptcy Act include the City and its liens is self-evident from the definition there given of those words. "Creditors" are in part defined to "include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act." "Claims" are in part defined to include "liens or other interests of whatever character." The City, as the holder of a lien against property of the debtor, unequivocally came within the literal wording of the statutory definitions.

That these words are to be given their broadest possible construction is clear from previous decisions of this Court as to the meaning of the definitions of "creditors" and "claims" in former Section 77 B (b) (10) of the

Bankruptcy Act in *Foust* v. *Munson S. S. Lines*, 299 U. S. 77 (1936); in former Section 1 (9) of the Bankruptcy Act in *American Surety Co.* v. *Marotta*, 287 U. S. 513 (1933); and in Section 77 (b) of the Bankruptcy Act in *Gardner* v. *New Jersey*, 329 U. S. 565 (1947). In the last-named case, this Court said (p. 573):

> "The words 'all holders of claims' have no qualification and are sufficiently broad to include public agencies as well as private parties. The 'claims' of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions. They are expressly included among provable claims in § 57 n of the Bankruptcy Act, 52 Stat. 840, 867, 11 U. S. C. § 93 (n). And the sweeping, all-inclusive definitions of 'claims' and 'creditors' in § 77 leave room for no exception under it."

This Court went on to say (pp. 575-6):

> "New Jersey contends that Congress did not include a State's tax liens within the scheme of § 77 proceedings. That is but another way of saying that since the State's asserted liens attached before the reorganization petition was filed, the only property of the debtor *in custodia legis* was its equity after the tax liens were satisfied.
>
> "We do not agree with that conclusion. We partially answered the contention when we reviewed the broad, all-inclusive nature of the definitions of 'creditors' and 'claims' contained in § 77 (b). As those definitions make plain, 'all holders of claims' include those who assert 'liens' against the property of the debtor.
>
> "Section 77 (b), moreover, gives the reorganization court broad powers over all types of liens. Thus

a plan of reorganization 'shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise.' § 77 (b) (1). A plan of reorganization may provide for 'the sale of all or any part of the property of the debtor either subject to or free from *any lien* at not less than a fair upset price.' § 77 (b) (5). (Italics added). It may order 'the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein.' *Id.* Or it may provide for 'the satisfaction or modification of *any liens*' or 'the curing or waiver of defaults' *Id.* (Italics added.) This is comprehensive language suggesting that all liens are included, not that some are beyond the reach of the court."

In addition, this Court reviewed the disastrous consequences of a less broad interpretation as follows (p. 577):

"If the reorganization court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals. That would not only seriously impair the power of the court to administer the estate and adversely affect the power of the Interstate Commerce Commission and the court to promulgate a reorganization plan. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 466-475; *Smith* v. *Hoboken Railroad, W. & S. C. Co.*, 328 U. S. 123. It would fly in the teeth of § 77 (a), which grants the reorganization court 'exclusive jurisdiction of the debtor and its property wherever located.' That jurisdiction is not limited to the prevention of interference with the use of the property by the trustee; it 'extends also to the adjudication

of questions respecting the title.' *Ex parte Baldwin*, 291 U. S. 610, 616; *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 140. It is the exclusive jurisdiction of the reorganization court which gives it power to preserve the railway as a unit and as a going concern and to prevent it from being divided up and dismembered piecemeal. Only in that way can continuous operation of the road be assured and a plan of reorganization be effected which not only safeguards the interests of the various claimants but is also compatible with the public interest. *Continental Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648; *Smith* v. *Hoboken Railroad, W. & S. C. Co., supra.*"

Reorganizations are particularly concerned with secured creditors. If they could stay out of every reorganization and rely solely on their security, no reorganization would be possible. Ordinary bankruptcies, on the other hand, are principally concerned with the orderly liquidation and distribution of the debtor's estate. It matters not in the accomplishment of this purpose that secured creditors stay out of the bankruptcy proceedings and rely solely on their security to satisfy their claims.

Prior to the decision in the *Gardner* case, *supra*, it had been held in *Board of Directors of St. Francis Levee District* v. *Kurn*, 98 F. 2d 394 (C. C. A. 8, 1938), cert. den. 305 U. S. 647, that taxes laid during the reorganization on real property on the basis of the betterment received by the property from the construction of levees, where the taxes under state law constituted a lien against the property assessed, were claims under Section 77 which the reorganization court could enjoin enforcement of and compel to be submitted to the court as bankruptcy claims within sixty days to determine their validity or be barred forever.

In corporate, non-railroad reorganizations under Chapter X of the National Bankruptcy Act claims of creditors

not against a debtor but only against his property have been held to come within the meaning of "claims" and "creditors" as there defined.

In re Sponsor Realty Corp., 48 F. Supp. 735 (S. D. N. Y., 1943);
In re R. A. Security Holdings, Inc., 46 F. Supp. 254 (E. D. N. Y., 1942), aff'd 134 F. 2d 164 (C. C. A. 2, 1943).

The same has been held to be true in Section 77B proceedings instituted by voluntary petition.

In re The Westover, Inc., 82 F. 2d 177 (C. C. A. 2, 1936).

Section 77 (b) of the National Bankruptcy Act speaks in words so broad in scope and so unmistakable in meaning that no further consideration of the matter by this Court beyond that already given is either necessary or appropriate. Judge Frank, in his dissenting opinion, in the court below, nowhere takes the position that the City was not a "creditor" within the meaning of the Act. On the contrary, his entire argument rests on the premise that the City was such a "creditor", entitled to notice by mail of the order barring unfiled claims.

(b)

The decision below is not in conflict with any other decisions either of the courts of appeal for other circuits or of this Court.

There is no conflict between the decision below and the decisions in *DeLaney* v. *City and County of Denver*, 185 F. 2d 246 (10th Cir., 1950), and *Clem* v. *Johnson*, 185 F. 2d 1011 (8th Cir., 1950), cert. den. 341 U. S. 909. The decision below was rendered in a railroad reorganization

proceeding under Section 77 while the two last-cited cases concerned ordinary bankruptcy proceedings.

In the case at bar, the City filed no claim or notice of lien and made no attempt to intervene in the reorganization proceedings, nor did it ever possess the liened real estate.

In the *DeLaney* case, *supra*, the City of Denver filed no formal claim or notice of lien in the bankruptcy proceedings but filed instead a petition seeking to intervene in order to assert its lien for unpaid personal property taxes against the proceeds from the sale by the trustee of the property taxed, which had never been in the City's possession. The decision pointed out that since the property subject to the tax lien was in the possession, and subject to the jurisdiction, of the bankruptcy court, the City's lien could be realized only in that court either by filing a claim or an intervening petition therefor.

In the *Clem* case, *supra*, an order was affirmed which granted a reclamation petition seeking surrender in the bankruptcy court from the bankrupt's trustee of an airplane on which the petitioner had a valid chattel mortgage granted by the bankrupt prior to his adjudication.

The holdings in both the *DeLaney* and *Clem* cases are therefore not in the least contrary to the holding in the present case, nor are they inconsistent with the dictum in *United States Bank* v. *Chase Bank*, 331 U. S. 28, 33 (1947), which states that the secured creditor of a bankrupt may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession, but must file a secured claim in order to retain his secured status if the security is within the jurisdiction of the bankruptcy court.

There is no conflict between the decision in the case at bar and the decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). That case dealt with what notice of periodic accountings must be given by trustees to the beneficiaries of common trust funds. In accordance with long-established principles as to the high duty of care owed by fiduciaries, particularly where their own honesty is at issue, this Court held that notice by publication to beneficiaries whose names and addresses were known by the trustees was insufficient under the special circumstances there involved, but recognized that no general rule applicable to all possible fact situations could be laid down and that notice by publication has in many different situations been held adequate.

In the case at bar the New Haven did not know whether the City had abandoned its stale, invalid claims, whether it still owned them, whether it had transferred or assigned them, and to whom such transfer or assignment might have been made. No accounting to known *cestuis que trust* for the personal probity and propriety of fiduciaries' actions to establish their possible *in personam* liability was involved. The New Haven's reorganization was essentially a proceeding *in rem*. See *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 241 (1934), and *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 429 (1925).

The filing of a petition in bankruptcy is a *caveat* to all the world. See *Mueller* v. *Nugent*, 184 U. S. 1, 14 (1892).

The burden rests on creditors having knowledge of a receivership or reorganization to make inquiry and to take whatever steps may be necessary to protect their rights.

Chicago Joint Stock Land Bank v. *Minn. L. & T. Co.*, 57 F. 2d 70 (C. C. A. 8, 1932);
Knapp v. *Detroit Leland Hotel*, 153 F. 2d 715 (C. C. A. 6, 1946).

Notice of bar orders limiting the time to file claims by publication only to such creditors has often been approved.

St. Louis & San Francisco R. R. Co. v. *Spiller*, 274 U. S. 304 (1927);

Chicago Joint Stock Land Bank v. *Minn. L. & T. Co., supra;*

Duebler v. *Sherneth Corp.*, 160 F. 2d 472 (C. C. A. 2, 1947);

Duryee v. *Erie R. Co.*, 76 F. Supp. 635 (N. D. Ohio, 1948), aff'd 175 F. 2d 58 (6th Cir., 1949), cert. den. 338 U. S. 861;

Remington on *Bankruptcy*, 5th Ed., Vol. 2, § 683, p. 117.

See:

Chicago, R. I. & P. Ry. Co. v. *Lincoln Horse & Mule Comm. Co.*, 284 Fed. 955, 957-8 (C. C. A. 8, 1922).

See also:

Mohonk Realty Corp. v. *Wise Shoe Stores*, 111 F. 2d 287, 290 (C. C. A. 2, 1940), cert. den. 311 U. S. 654.

Section 77 (c) (8) gives the judge in charge of a railroad reorganization specific authority to give notice of bar orders to creditors by publication. The district judge in the present case merely did what the statute allowed. Consequently, no valid objection to his actions may be taken.

(c)

The decision below is clearly correct.

The district court had both express and inherent jurisdiction to entertain and act upon the New Haven's petition.

Paragraph 2 of Part IX of its consummation order and final decree in the New Haven's reorganization proceedings reserved to it jurisdiction in sub-paragraph (d) to consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the consummation order and to construe the plan of reorganization as to matters which may require construction, not dealt with in the consummation order, and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the consummation order and the plan of reorganization and all other orders relative thereto (R. 88, 90).

The consummation order did not deal with the City's unpaid assessments, and the New Haven petitioned the district court, under sub-paragraph (d), to ask the court to construe Section L of the plan of reorganization (R. 91) to determine whether that section was intended to deal with the City's unpaid assessments. The New Haven, under sub-paragraph (q), sought further relief, in the event of a favorable construction of the plan, to prevent the City from blocking the carrying out of the plan by insisting on payment of its assessments and asserting its liens therefor.

6

The express reservations of jurisdiction in the consummation order under which the district court acted were both customary and proper.

In re Pittsburgh Terminal Coal Corp., 183 F. 2d 520 (3d Cir., 1950), cert. den. 340 U. S. 904;

Duryee v. *Erie R. Co.*, 175 F. 2d 58 (6th Cir., 1949), cert. den. 338 U. S. 861;
In re Hermitage Bldg. Corp., 100 F. 2d 597 (C. C. A. 7, 1938).

Even without such reservations, a court in charge of a reorganization has inherent power to see that a plan of reorganization is consummated, to protect the confirmation decree, to prevent interference with the execution of the plan, and to aid in the interpretation and operation of the plan.

North American Car Corp. v. *Peerless W. & V. Mach. Corp.*, 143 F. 2d 938 (C. C. A. 2, 1944);
Shores v. *Hendy Realization Co.*, 133 F. 2d 738 (C. C. A. 9, 1943);
Curtis v. *O'Leary*, 131 F. 2d 240 (C. C. A. 8, 1942).

Nowhere in the reorganization plan and orders is there any specific reference to the City's assessments. No specific reference to them, however, could be expected, since no claim therefor was ever filed or evidenced.

Had the City filed a claim, had the bankruptcy court overruled in whole or in part the New Haven's contention that the assessments were void, and had the correct amount due on the assessments been determined, then Section L of the plan of reorganization would have become applicable where it provides (R. 91):

"L. Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority

as they now have with respect to other obligations of such debtors."

Judge Hincks held that the word "Claims" in Section L meant "filed claims" particularly when read in the context of Sections 77 (c) and 77 (f) and other parts of Section 77 (R. 111). Since Section 77 (c) (7) denies any and all priority to claims not filed and the City never filed a claim, it had no "claim • • • entitled to priority" within the meaning of Section L of the plan.

Under Section R of the plan, "The construction of the plan by the court shall be final and conclusive" (R. 96). Judge Hincks' construction of Section L, therefore, finally determines any question as to the meaning of "claims" in that section.

"Claims" in Section L must refer to known and approved claims filed in the bankruptcy court, rather than to unknown, unfiled, contestable claims of which the Interstate Commerce Commission, the bankruptcy court and creditors had no knowledge and of which the validity and correct amount were never determined. Neither the commission nor the court could ever have intended to place on the debtor a burden of unknown quantity which could conceivably undo the entire work accomplished by the reorganization, nor would the creditors who filed claims ever have approved the plan on such an uncertain basis.

The purpose of reorganizations is to review all claims, including secured claims, against the debtor and its property, to eliminate those which are invalid, to ascertain the correct amount of those which are valid, and to scale down established claims to a workable basis. This purpose cannot be achieved if secured claimants can choose to leave the bankruptcy court unaware of their claims, to remain outside of the reorganization proceedings and to rely solely on their security, or if the bankruptcy court must accept

all secured claims at their asserted value without having an opportunity to review their validity and amount. These basic objectives of reorganization must be kept in mind in the determination of the meaning of Section L in the plan.

The consummation order nowhere referred to the City's assessments, although it listed specifically the obligations to be paid in cash or to be assumed by the reorganized debtor (R. 85-86). All other claims not so listed were declared to be void and unenforcible, and their prosecution or enforcement was enjoined (R. 84-85, 87).

The City had actual knowledge of the New Haven's reorganization proceedings almost from their inception. These proceedings lasted twelve years. The City knew that the New Haven had always refused to pay the assessments here involved on the ground that they were invalid and void. Some of the assessments went back as far as 1894 and none was later than 1930. The New Haven continued during its reorganization to refuse to pay these assessments.

The City nonetheless took no steps of any kind to protect its rights either during or after the reorganization, until the petition brought in the district court by the New Haven in the present case stirred up its answer. The City was guilty of gross laches, which bar its claims forever.

In re Chicago, R. I. & P. Ry. Co., 168 F. 2d 587 (C. C. A. 7, 1948), cert. den. 335 U. S. 855;
McColgan v. *Maier Brewing Co.*, 134 F. 2d 385 (C. C. A. 9, 1943), cert. den. 320 U. S. 737;
Piedmont Ice & Coal Co. v. *American Service Co.*, 130 F. 2d 78 (C. C. A. 4, 1942);
In re Thornycroft Inc., 120 F. 2d 469 (C. C. A. 2, 1941);

In re Missouri Pac. R. Co., 64 F. Supp. 64 (E. D. Mo., 1945), aff'd *sub nom. Comstock* v. *Group of Institutional Investors*, 163 F. 2d 350 (C. C. A. 8, 1947), aff'd 335 U. S. 211 (1948), reh. den. 335 U. S. 837.

Section 77 (f) of the National Bankruptcy Act, 11 U. S. C. A., § 205 (f), makes the plan of reorganization and the order of confirmation thereof binding upon "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed", and directs that the "property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention * * *." The all-inclusive definition of "claims" and "creditors" in Section 77 (b) has already been explained. These words have the same meaning in Section 77 (f).

The consummation order and final decree which terminated the New Haven's reorganization also irrevocably and expressly terminated all claims or liens against its property which the City might up to that time have asserted. New rights to this property were thereupon established in new persons in accordance with the plan of reorganization, and they have for five years acted in reliance on their new rights. Modification of this plan to the prejudice of these new rights is no longer permissible, and is beyond the power of the reorganization court.

Detroit Harbor Terminals, Inc. v. *Kuschinski*, 181 F. 2d 541 (6th Cir., 1950);

In re Higbee Co., 164 F. 2d 426 (C. C. A. 6, 1947);
Duebler v. *Sherneth Corp.*, *supra*;
In re Peyton Realty Co., 148 F. 2d 771 (C. C. A. 3, 1945);
Standard Steel Works v. *American Pipe & Steel Corp.*, 111 F. 2d 1000 (C. C. A. 9, 1940);
In re Corona Radio & Television Corp., 102 F. 2d 959 (C. C. A. 7, 1939).

CONCLUSION.

For the foregoing reasons it is prayed that this petition for a writ of certiorari be denied.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent.

ROBERT M. PEET,
Of Counsel.

APPENDIX A.

Section 77 (a), 11 U. S. C. A., § 205 (a), reads in part as follows:

> "If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Section 77 (b), 11 U. S. C. A., § 205 (b), reads in part as follows:

> "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Section 77 (c) (1), 11 U. S. C. A., § 205 (c) (1), reads in part as follows:

> "The judge shall forthwith (and in pending proceedings immediately upon August 27, 1935) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such

period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property."

Section 77 (c) (4), 11 U. S. C. A., § 205 (c) (4), reads in part as follows:

"The judge * * * shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, * * *"

Section 77 (c) (7), 11 U. S. C. A., § 205 (c) (7), reads in part as follows:

"The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests."

Section 77 (c) (8), 11 U. S. C. A., § 205 (c) (8), reads as follows:

"The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given

creditors and stockholders by publication or otherwise."

Section 77 (f), 11 U. S. C. A., § 205 (f), reads in part as follows:

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

Section 77 (l), 11 U. S. C. A., § 205 (l), reads as follows:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

EDWARD R. BRUMLEY,
Counsel for Respondent,
Room 3841, Grand Central Terminal,
New York 17, N. Y.

ROBERT M. PEET,
JAMES D. O'NEILL,
Of Counsel.

INDEX.

Table of Cases Cited:

OTHER AUTHORITIES CITED:

Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

Opinions of the Courts Below.

The opinion of Judge Hincks of the United States District Court for the District of Connecticut (R. 80-92) is reported in 105 F. Supp. 413.

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit affirming the order appealed from on the opinion of the District Court (R. 94), together with the dissenting opinion of Judge Frank (R. 94-106), is reported in 197 F. 2d 428.

Jurisdiction.

The judgment of the Court of Appeals was rendered and filed on June 5, 1952 (R. 106-107). Petition for writ of certiorari was filed on July 16, 1952. Certiorari was granted on October 13, 1952 (R. 108).

Jurisdiction of this Court under 28 U. S. C., § 1254 (1) is alleged.

Questions Presented.

The principal questions presented are as follows:

(1) Was the City a "creditor" holding "claims" within the meaning of subsection 77 (b) of the Bankruptcy Act with respect to its unpaid pre-bankruptcy assessments for local improvements secured by liens on the specific parcels of real property of the Railroad that were assessed?

(2) If so, were the City's "claims" forever barred by its failure to file them or to intervene in the Railroad's reorganization proceedings prior to the final decree, where the City had actual knowledge of the proceedings and notice by publication of a general bar order in the proceedings requiring the filing of all claims of creditors?

(3) Were the City's "claims" preserved by the terms of the Plan of Reorganization and the Final Decree in the reorganization proceedings?

Statutes Involved.

The sections of the Bankruptcy Acts referred to herein are set forth in an appendix.

Statement of the Case.

From 1894 to 1930 the City laid upon certain real property belonging to the Railroad in Bronx County a number of assessments for local improvements (R. 3, 6-16). The Railroad has refused to pay these assessments ever since they were laid, on the ground that they were void as a matter of law (R. 2, 18). The Railroad did not seek review of these assessments by means of the procedures provided for that purpose, because under New York law an assessment which is void as a matter of law remains void whether or not such review is obtained (R. 18). Under the law of New York, each assessment, insofar as valid and not void, became a lien in favor of the City against the specific real property upon which it was laid, until paid in full (R. 2). Whether there was any personal liability on the part of the Railroad depends on the applicability of Section 71 of the Tax Law of New York.

On October 23, 1935 proceedings for the reorganization of the Railroad under Section 77 of the Bankruptcy Act were commenced in the United States District Court for the District of Connecticut (R. 2). Nearly twelve years later, on September 18, 1947, a Consummation Order and Final Decree concluding these reorganization proceedings became effective (R. 2).

Under the terms of Order No. 32 in these proceedings, issued on January 4, 1936 pursuant to Section 77 (c) (7) of the Bankruptcy Act, claims of creditors were required to be filed or evidenced by May 1, 1936, and after that date no claim not so filed or evidenced might participate except on order for cause shown (R. 40). Under this order, creditors were directed to set forth in their claim the nature of any security for the claim and the facts with respect to any lien, priority or preferential classification claimed (R. 40). The terms of this order were pub-

lished, among other places, in the Wall Street Journal in New York City once a week for two consecutive weeks (R. 20, 41).

The City had actual notice of the Railroad's reorganization proceedings by June of 1936 or earlier, but never at any time has it filed or evidenced a claim for its unpaid assessments and the liens therefor or sought to intervene in the reorganization proceedings or petitioned for leave to file a claim (R. 20).

The assessed property has at all times been in the exclusive possession and control of the Railroad or its reorganization trustees (R. 2).

Nowhere in the Plan of Reorganization, the Order Confirming the Plan, the Consummation Order and Final Decree, or the trustees' deed pursuant thereto is there any specific reference to the City's unpaid assessments (R. 18, 54-61, 66-76).

Section L of the Plan of Reorganization, the only section which could possibly apply to the City's claim, provided that claims against the debtor entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the Plan, were to be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of the debtor (R. 71).

The Order Confirming the Plan made it binding upon all creditors, secured or unsecured, whether or not they were adversely affected by the Plan, whether or not they filed claims, and whether or not they accepted the Plan (R. 60). It further declared that the property dealt with by the Plan, when transferred and conveyed to the reorganized

company pursuant to the Plan, was to be free and clear of all claims of creditors and of all liens and encumbrances, except such as might be reserved in the Plan, in this order or in the order of transfer and conveyance (R. 60).

The Consummation Order and Final Decree stated that upon the consummation date all the business, affairs, and entire property and estate of the debtor and its trustees were to vest in and become the absolute property of the reorganized company free and clear of all claims, rights, demands, interest, liens and encumbrances of creditors of the debtor or its properties, except for those specifically referred to therein (R. 66). The Consummation Order released and discharged the debtor forever from all of its obligations, debts and liabilities, whether or not presented or allowed in the reorganization proceedings, and from all claims enforcible against its property, except those claims to be paid or assumed in accordance with the Plan of Reorganization (R. 66). The Consummation Order provided that all mortgages, bonds, notes, securities, obligations, debts and liabilities without limitation as to their nature, whether enforcible against the debtor or its property, were to become void and unenforcible against the reorganized company or its property, unless specifically provided for therein (R. 66). Finally, the Consummation Order contained a broad protective injunction to insure its enforcement that included a perpetual restraint against enforcing liens against the reorganized company's real property (R. 68-69).

The deed from the trustees of the debtor to the reorganized company transferred the real property held by the former free and clear of all claims, rights, demands, interests, liens and encumbrances of creditors except those imposed by the Consummation Order (R. 18).

Since September 18, 1947, when the Consummation Order went into effect, the Railroad has repeatedly at-

tempted to sell, and to collect awards for the taking of, its real property in the Bronx free and clear of the City's pre-bankruptcy assessments and liens, but the City has refused to cancel any such assessments and liens of record without receiving payment in full, though requested to do so (R. 2-3).

In paragraph 2 of Section XI of the Consummation Order the bankruptcy court reserved jurdisiction in sub-paragraph (d) to consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the Consummation Order and to construe the Plan of Reorganization as to matters which may require construction, not dealt with in the Consummation Order, and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the Plan of Reorganization, the Consummation Order, and all other orders relative thereto previously issued (R. 69, 71).

The Railroad brought the present petition before the bankruptcy court to obtain instruction whether or not the Plan of Reorganization and the Consummation Order require the payment or assumption of any of the City's pre-bankruptcy assessments outstanding against the Railroad's real property in the Bronx, or make any reservations in favor of such assessments (R. 4). In the event that the Court found that no such requirements or reservations existed, the Railroad asked the Court to declare its real property subject to such assessments free and clear of all liens therefor, to restrain the City from enforcing or attempting to enforce these liens, and to direct the City to cancel of record all such assessments (R. 4).

The Court granted the petition of the Railroad in all respects, finding no requirement or reservation favorable to the City in the Plan of Reorganization or the Consummation Order and granting the full declaratory, injunctive and mandatory relief requested (R. 76-77).

The Court of Appeals affirmed the District Court's order. (R. 94).

Summary of Argument.

The reorganization court had jurisdiction to entertain the petition of the Railroad by reason of the express reservations in the Consummation Order and Final Decree and generally recognized ancillary jurisdiction.

The City of New York was a creditor and its assessment liens were claims under subsection (b) of § 77 of the Bankruptcy Act.

The judge gave reasonable notice of the period in which claims might be filed in accordance with subsection (c) (8) of § 77 and the City has failed to file any notice of claim, although it had timely notice of the reorganization proceedings. Furthermore, as the security was within the jurisdiction of the bankruptcy court, regardless of actual notice of the bar order, the City, with knowledge of the reorganization proceedings, was under the affirmative duty to file a secured claim if it wished to retain its secured status.

An examination of the proceedings, the Plan, and the Consummation Order and Final Decree shows they were intended to bar the liens and be binding upon the City as provided in subsection (f) of § 77.

POINT I.

The District Court had jurisdiction of Respondent's petition.

No doubt as to the jurisdiction of the District Court to entertain the Railroad's petition was expressed by the City in that Court or before the Court of Appeals or in this Court. The District Court declared that it had such jurisdiction (R. 83). The Court of Appeals accepted the opinion of the District Court (R. 94). The dissenting opinion of Judge Frank in the Court of Appeals, while it did not conclude that jurisdiction was lacking, referred to the decisions in several earlier Second Circuit cases involving straight bankruptcy proceedings rather than reorganizations as casting doubt on the question (R. 106).

Paragraph 2 of Section XI of the District Court's Consummation Order and Final Decree reserves to it jurisdiction in sub-paragraph (d) to consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the Consummation Order and to construe the Plan of Reorganization as to matters which may require construction, not dealt with in the Consummation Order (R. 69), and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the Consummation Order and the Plan of Reorganization and all other orders relative thereto (R. 71).

Section L of the Plan of Reorganization provides in part (R. 71):

> "Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees

during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

No provisions in the Plan of Reorganization or the Consummation Order and Final Decree refer specifically to the outstanding assessments for local improvements of the City. The part of Section L of the Plan quoted above is the only general provision which might apply to them. When, after the date of the Consummation Order and Final Decree, the City insisted on the enforcibility of its assessments despite its failure to file claim therefor in the reorganization proceedings, the Railroad brought the present petition before the District Court to secure instructions whether or not the Plan of Reorganization (particularly Section L) and the Consummation Order and Final Decree require the payment or assumption of any or all of the assessments of the City or make any reservations in their favor (R. 2, 3, 4). At the same time, the Railroad sought to enjoin the City from violating the terms of the injunction set forth in paragraph 1 of Section XI of the Consummation Order and Final Decree, by which all persons were perpetually restrained from disturbing, interfering with, enforcing liens upon and bringing suit against the property of the reorganized Railroad by reason of any previous claim against the property not imposed by the Plan of Reorganization and the Consummation Order and Final Decree (R. 4, 68).

The District Court's reservation to construe the Plan of Reorganization and injunction to secure execution of the Plan, found in its Consummation Order and Final Decree, are commonly found in such orders and reasonably necessary to achieve and secure the ultimate fruits of the reorganization. Such provisions do not seek to

continue control over the reorganized debtor, to share in the operation of its business or to alter rights vested under the Plan of Reorganization. They merely reserve to the Court which has already dealt with the complexities of the Plan the right to interpret and protect its own decrees in aid of the Plan.

The right of the Court in charge of the reorganization to retain jurisdiction to protect its own decrees, to prevent interference with the execution of the Plan and to aid otherwise in carrying it out is well recognized.

In re The New York, New Haven and Hartford R. Co., 169 F. 2d 337 (C. C. A. 2, 1948), cert. den. 335 U. S. 867;
In re Pittsburgh Terminal Coal Corp., 183 F. 2d 520 (3d Cir., 1950);
In re Hermitage Building Corp., 100 F. 2d 597 (C. C. A. 7, 1938).

The same right has been recognized in courts of equity handling railroad foreclosures.

Julian v. *Central Trust Co.*, 193 U. S. 93.

The court may exercise such jurisdiction even where it has not expressly reserved it.

In re United Bancroft Hotel Co., 86 F. Supp. 690 (D. C. Mass., 1949);
Shores v. *Hendy Realization Co.*, 133 F. 2d 738 (C. C. A. 9, 1943).

In the last-named case, the court said (at p. 741):

"The question was one of interpretation. It involved the administration of the plan itself. The court best equipped as well as the one properly en-

titled to resolve disputes of that kind was the court in which the proceeding had been conducted. As to fundamental questions of interpretation and administration such as these we think the jurisdiction of the bankruptcy court continues whether future consideration of them was expressly reserved or not. Otherwise, interpretations at war with each other no less than with the decree itself may well result."

Although the need for exercising such ancillary jurisdiction is not so great in ordinary bankruptcies, which do not involve the lengthy proceedings and elaborate plans and decrees found in reorganizations, there too the jurisdiction has been upheld. *Local Loan Co.* v. *Hunt*, 292 U. S. 234.

In equity, federal courts have long exercised jurisdiction ancillary to original decrees. The scope of this jurisdiction was defined in *Lewis* v. *United Air Lines Transport Corp.*, 29 F. Supp. 112, 115 (D. C. Conn., 1939) as: "(1) to aid, enjoin or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit." The scope of the jurisdiction of courts handling reorganizations should be equally as broad, since they "are essentially courts of equity, and their proceedings inherently proceedings in equity . . . Their adjudication and orders constitute in all essential particulars decrees in equity." *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675.

POINT II.

The reorganization court had jurisdiction over the pre-bankruptcy assessment liens of the City, and the bar order was binding upon the City.

Property in possession of a receiver is not subject to seizure to enforce collection of a state tax. *In re Tyler*, 149 U. S. 164. A bankruptcy court may restrain the foreclosure of a mortgage on the debtor's property which was begun in another court after the bankruptcy petition was filed. *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734.

The case of *Van Huffel* v. *Harkelrode*, 284 U. S. 225, held that the bankruptcy court had power to deal with the liens of a state. Van Huffel, the plaintiff, bought real property at a bankruptcy sale, free of all liens and encumbrances. Defendant later asserted a lien for unpaid pre-bankruptcy state taxes. Van Huffel sued to quiet his title. The bankruptcy court had the power to sell the property free of the liens for state taxes, and objections as to failure to receive proper notice of the sale and as to the use of a summary instead of a plenary proceeding to determine the priority of liens could not be urged for the first time in this Court.

New York v. *Irving Trust Co.*, 288 U. S. 329, held that a bar order was appropriate against state franchise taxes, otherwise "a fundamental purpose of the Bankruptcy Act would be frustrated" (p. 333). These taxes were liens upon real and personal property. *Carey* v. *Keith*, 250 N. Y. 216 (1929).

The purpose of § 77 is the reorganization of financially embarrassed railroads and to that end the reorganization court has the authority to enjoin the sale of collateral

notes secured by mortgage bonds. *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co., supra,* 294 U. S. 648, 675-676. Subsection 77 (a) grants to the court "exclusive jurisdiction of the debtor and its property, wherever located, * * *." By subsection (j) the judge is authorized to "enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate * * *." Under subsection 77 (o) the judge may order the sale of property subject to or free from liens. Subsection 77 (f) gives the judge the power to restrain prosecution in a state court of suit for the collection of taxes. *Board of Directors of St. Francis Levee District* v. *Kurn,* 91 F. 2d 148 (C. C. A. 8, 1937), cert. den. 302 U. S. 750. Although state law made the taxes a lien against the property assessed an order to the Levee District to present its claims for taxes to the bankruptcy court was affirmed.

Ex parte Baldwin, 291 U. S. 610, arose in a § 77 proceeding. Plaintiff sued in a state court to forfeit the right of defendant trustees to land in their possession held subject to a defeasance clause in the event of failure to operate trains thereover. The bankruptcy court could not only protect from interference property in its possession but could determine all questions respecting it, including "the adjudication of questions respecting the title" (p. 616).

This Court held, in *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, a § 77 proceeding, that a bankruptcy court had jurisdiction to settle a bankrupt's title to land.

The reorganization court has "broad powers over all types of liens," given by subsection 77 (b). *Gardner* v. *State of New Jersey,* 329 U. S. 565, 576. The State of New Jersey filed a proof of claim, claiming a lien upon all the lands, tangible properties and franchises of the debtor in New Jersey. The trustees filed a petition for adjudication

concerning the claims. The Attorney General of New Jersey objected to the jurisdiction of the District Court to entertain the petition, despite the prior filing of the State's proof of claim. This Court held that the claim was filed pursuant to authority and to hold otherwise might imperil it as the time for filing had expired. This Court held that the reorganization court had jurisdiction over the proof and allowance of the tax claims. The State contended that the bankruptcy court had no jurisdiction to adjudicate its secured claim.

The opinion in this Court says (pp. 572-574):

> "*First.* We think, contrary to the position of New Jersey, that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was not a suit against the State. Section 77 deals not only with claims of private parties but with those of public agencies as well. Section 77 (b) defines 'creditors' as 'all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act.' And 'claims' are defined to include 'debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character.'
>
> "*Id.* And § 77 (c) (7) provides for the prompt fixing of a reasonable time within which the 'claims of creditors' may be filed and the manner in which they may be filed and allowed. The words 'all holders of claims' have no qualification and are sufficiently broad to include public agencies as well as private parties. The 'claims' of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions. They are expressly included among provable claims in § 57n of

the Bankruptcy Act, 52 Stat. 840, 867, 11 U. S. C. § 93 (n). And the sweeping, all-inclusive definitions of 'claims' and 'creditors' in § 77 leave room for no exception under it."

The opinion refers to *New York* v. *Irving Trust Co.*, *supra*, 288 U. S. 329, in which a State's tax claim was barred because not filed within time. It then continues (p. 575):

"To hold otherwise might, indeed, imperil the claim which New Jersey so vigorously asserts. For it appears that the time for filing claims has expired and under the rule of *New York* v. *Irving Trust Co.*, *supra*, a filing at this late date might come too late."

The *Gardner* decision holds (p. 576) that the reorganization court has broad powers over all types of liens under subsection (b) of § 77. Subsection (b) (1) provides that a plan shall include provisions as to rights of secured creditors. Subsection (b) (5) directs that a plan may include the sale of property subject to or free from any lien, the satisfaction or modification of any liens.

The opinion says (pp. 576-577):

"While valid liens existing at the commencement of bankruptcy proceedings have always been preserved, it has long been a function of the bankruptcy court to ascertain their validity and extent and to determine the method of their liquidation. *Whitney* v. *Wenman*, 198 U. S. 539, 552; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737-738; *Straton* v. *New*, 283 U. S. 318, 321. Moreover, both in receivership cases, *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480, and in bankruptcy cases, *Van Huffel* v. *Harkelrode*, 284 U. S. 225; *New York* v. *Irving Trust Co.*, *supra*, the authority of the court to deal with the lien of a State has long been recognized. In reorganization cases the task of re-

solving disputes as to liens is a common one for the court. See *Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 569. Indeed, before a plan of reorganization can be designed in accord with fair and equitable requirements, liens must be disentangled and their relative priorities ascertained. This problem, present in most reorganizations, is acute in the railroad field."

Taxes which, under state law, constitute a lien against the property assessed are claims under §77.[1] *Board of Directors of St. Francis Levee District* v. *Kurn*, 98 F. 2d 394 (C. C. A. 8, 1938), cert. den. 305 U. S. 647. The necessity for dealing with liens in a corporate reorganization is obvious, especially in a railroad reorganization where so much of the property is covered by secured claims. Not to consider a lien would hinder reorganization and the purpose of §77. *Lyford* v. *State of New York*, 140 F. 2d 840 (C. C. A. 2, 1944).

Subsection 77 (b) in the 1933 Act included in "creditors" all holders of claims of whatever character against the debtor or its property. There is no significance, therefore, to lack of discussion in Congress of the wording of subsection 77 (b) as it was passed in 1935 as urged by the City (Brief, pp. 8-13).

Prior to 1938 subsection 57 (n) contained no such broad and all-inclusive language as that incorporated in 1933 in

---

[1] In reorganizations under Chapter X of the Bankruptcy Act claims of creditors solely against property have been held to come within the meaning of "claims" and "creditors" as defined.

In re Sponsor Realty Corp., 48 F. Supp. 735 (S. D. N. Y. 1943);

In re R. A. Security Holdings, Inc., 46 F. Supp. 254 (E. D. N. Y. 1942), aff'd 134 F. 2d 164 (C. C. A. 2, 1943).

The same holding was made in a § 77 B proceeding.

In re Westover, Inc., 82 F. 2d 177 (C. C. A. 2, 1936).

subsection 77 (b). In 1938, however, the revisions included a drastic amendment to subsection 57 (n), providing that all claims "including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided * * *." This revision subjected governmental claims to the same requirements as other claims, a purpose accomplished five years earlier as to railroad reorganization by the broad language of § 77. See Wurzel, *Taxation During Bankruptcy Liquidation* (1942), 55 Harv. L. Rev. 1141, 1146.

In *United States National Bank* v. *Chase National Bank*, 331 U. S. 28, judgment creditors filed secured claims in bankruptcy proceedings reciting as security liens on real property. It was held, under subsection 57 (h), that they could avail themselves of their security and share in the general assets as to the unsecured balance.

The opinion says (pp. 33-34):

> "Under these provisions [referring to § 57 (h) and 65 (a)] there are several avenues of action open to a secured creditor of a bankrupt. See 3 Collier on Bankruptcy (14th ed.) pp. 149-157, 255-259. (1) He may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession. *In re Cherokee Public Service Co.*, 94 F. 2d 536; *Ward* v. *First Nat. Bank*, 202 F. 609. (2) He must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734. (3) He may surrender or waive his security and prove his entire claim as an unsecured one. *In re Medina Quarry Co.*, 179 F. 929; *Morrison* v. *Rieman*, 249 F. 97. (4) He may avail himself of his

security and share in the general assets as to the unsecured balance. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131; *Ex parte City Bank*, 3 How. 292, 315."

The courts below took the view that *United States National Bank* v. *Chase National Bank, supra*, held that a lien creditor could rely solely on his lien only if the security was in his possession (R. 89).

See Collier, *Bankruptcy*, 14th ed., Vol. 3, § 57.07, p. 157, and text added in supplement.

The City's brief lays great stress on two cases (Brief, pp. 13-15, 23). In *Clem* v. *Johnson*, 185 F. 2d 1011 (8th Cir., 1950), cert. den. 341 U. S. 909, Clem was adjudicated a bankrupt in February, 1949, and in May, 1949, Johnson demanded an airplane on which he had a mortgage, but did not file a claim under subsection 57 (n). In February, 1950, however, Johnson filed a reclamation petition. The court held that the failure of Johnson to file a claim within six months in accordance with subsection 57 (n), did not result in loss of security and the petition for reclamation was sufficient. The trial court pointed out (94 F. Supp. 225) that a secured creditor need not comply with § 57 and file a claim but because of the possession of the bankruptcy court and its full jurisdiction the secured creditor must file an intervening petition to determine the validity of the lien and to supervise its enforcement.

The second case stressed by the City is *DeLaney* v. *City and County of Denver*, 185 F. 2d 246 (10th Cir., 1950). The City of Denver had tax liens upon assets of the bankrupt. It did not file a claim for taxes within six months but at a later date filed an intervening petition in which it disclaimed any claim against general assets but prayed that its tax liens be satisfied. It was held

that the filing of a formal claim under § 57 was not essential to the preservation of a lien.

> "However, after the jurisdiction of the bankruptcy court has attached to the security, the lien claimant may assert his lien to such security, or to the proceeds derived from the sale thereof, only in the bankruptcy court" (p. 251).

These two decisions make clear that a lien claimant must assert his claim to the security in the bankruptcy court. See *Bolling* v. *Bowen*, 118 F. 2d 59 (C. C. A. 4, 1941) (to assert lien on property in possession of bankruptcy court lienor must file petition and make necessary proof).

With reference to § 64 the City argues (p. 23) that this put upon the trustees the affirmative duty of searching out and paying all taxes legally due and owing. Prior to the amendment of June 22, 1938, § 64 provided for order by the court to the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality. In 1938 this provision was eliminated from subsection 64 (a) and now calls for hearing and determination as to the amount or legality of any taxes. At the same time subsection 57 (n) was amended to require that all claims due the United States or any State or subdivision thereof should be filed and proved like other claims against bankrupt estates.

> "When 1926 amendments of § 64 eliminated the arbitrary directive for payment of taxes and placed taxes in a priority status behind the expenses of administration and wage claims, any burden that might previously have been considered to exist on the trustee to run down and pay such obligations ceased to be part of the law." Remington, *Bankruptcy*, Vol. 6 (5th ed.), § 2829, pp. 422-423.

"The duty to search out taxes no longer exists as to pre-bankruptcy tax claims since these must now be proved like any other claim, but as to current taxes the trustee is himself the taxpayer or the taxpayer's representative." Wurzel, *Taxation During Bankruptcy Liquidation* (1942), 55 Harv. L. Rev. 1141, 1175.

Statutes providing for payment of taxes do not dispense with the necessity for the taxing authority to file a claim. Payment of taxes legally due and owing follows the claim and proof of amount and legality. Section 64 at no period dispensed with the necessity for making timely demand for payment of liens. The same result was reached in a receivership case. *McColgan* v. *Maier Brewing Co.*, 134 F. 2 . 385 (C. C. A. 9, 1943), cert. den. 320 U. S. 737. The same result would be reached under Order No. 1 (R. 42).

This Court has reserved decision on whether subsection 64 (a) is applicable in reorganizations under § 77. *Gardner* v. *New Jersey*, 329 U. S. 565, 578, n. 7; *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132. See Finletter, *The Law of Bankruptcy Reorganization* (1939 ed.), pp. 343-344; and Collier, *Bankruptcy*, Vol. 5 (14th ed.), par. 77.21, p. 539.

Furthermore, as shown above, in 1938 the provision for payment of taxes was eliminated and the New Haven's reorganization continued until September 18, 1947 during which time the City did nothing in spite of its knowledge of the proceedings.

It has been suggested that § 64 refers to taxes and not assessments, and to taxes unsecured by any lien. See *In re Dublin Veneer Co.*, 1 F. Supp. 313, 316 (S. D. Ga., 1932); and City's brief, p. 8.

The City alleges that under subsection (b) (evidently referring to (d)) of § 67, prior to 1938, and under present subsection (b), statutory tax liens on real property have been protected and that the filing of a notice of claim is not necessary (City's brief, pp. 9, 12-14).

It is quite obvious that subsection 67 (d) (prior to 1938) did not refer to statutory tax liens because they are not the "Liens given or accepted in good faith" there described. Present subsection 67 (b) provides that "statutory liens for taxes and debts owing to the United States or any State or subdivision thereof * * * may be valid against the trustee * * *." Present subsection 57 (n) provides that "all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided * * *." Subsection 67 (b) effected little change in the bankruptcy law, and read with subsection 57 (n) does not warrant the City's conclusion that it was not required to file a notice of claim.

Section 6 b of the Chandler Act of 1938 makes its provisions applicable to pending cases "so far as practicable."

> "It behooves creditors (in § 77 proceedings) to be vigilant in ascertaining the court's order fixing the time (to file claims), and to make sure that their claims are filed in time, for otherwise they may be unable to participate in the plan." Remington, *Bankruptcy* (1947 Replacement), Vol. 10, § 4192, p. 316.

POINT III.

With at least constructive notice of the bar order and actual knowledge of the bankruptcy proceedings the petitioner failed to file a notice of claim to preserve its statutory liens, as required, with the consequence that the property covered by the liens was properly declared by the Final Decree to be free and clear of the liens.

The sole issue in the United States Court of Appeals was whether the City was required to file a notice of claim with the trustees in reorganization in order to preserve its statutory liens for local assessments against specific parcels of real property (City's brief, Court of Appeals, p. 1). Under this issue it made two points: (1) since the reorganization court at no time affirmatively and upon specific notice to the City exercised jurisdiction over the liens, the Debtor took back the property subject to the liens; and (2) the proceedings, the Plan and Final Decree were not intended to and did not materially or adversely affect the liens.

In its petition for certiorari the City says (p. 7) two questions are presented: (1) whether the City is a creditor within the meaning of subsection 77 (c) (7); and (2) whether notice by publication to file claims is a reasonable notice under subsection 77 (c) (8). The second question was not presented until the petition for certiorari was filed. By reason of the position of the City up to that time it had been eliminated.

It is only in exceptional cases that this Court will consider questions not pressed or passed upon by the courts below. See *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434. This Court has followed a

policy of strict necessity in disposing of constitutional questions and, even where a constitutional question is properly presented by the record, the Court will not pass upon it if there is some other ground upon which the case may be disposed of. See Mr. Justice Brandeis concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347; *Alma Motor Co.* v. *Timken Co.*, 329 U. S. 129, 136, 137; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568.

Subsection 77 (c) (8) reads in part:

> "The judge shall cause reasonable notice of the period in which claims may be filed * * * by publication or otherwise."

Order No. 32 (R. 39-41), issued pursuant to subsection 77 (c) (7), and dated January 4, 1936, provided for the filing of claims by May 1, 1936, covered details with respect to the contents of claims and liens and their filing, and directed the Debtor to give notice to its creditors by promptly causing publication of a notice, containing all the foregoing, to be made once during each week for two consecutive weeks in five newspapers, including the Wall Street Journal, and by mailing copies of the order to its mortgage trustees and to such others as had entered their appearances.

The petition in this proceeding alleges (R. 3, par. 8) that the City of New York had timely notice of the reorganization proceedings and that the City has intentionally refused to file or evidence a claim for any of the assessments.

In its answer the City alleges that it has refused to cancel, discharge or remove any of the assessments and the liens thereof without receiving payment in full and that it has at all times insisted on enforcement of its assessment liens (R. 21-22, par. Fourth).

The affidavit of Meyer Scheps, Associate Assistant Corporation Counsel of the City of New York, shows that the City and the Trustees or their counsel dealt with the liens during reorganization (R. 38-39, par. 45).

The affidavit refers to Order No. 32, states that it provided for mailed notice to mortgage trustees and notice by publication for other creditors. The affidavit makes no complaint of the method of notice, that it was published rather than mailed, but argues that it was not intended for the City (R. 28, par. 17). The affidavit says: "The City relied upon the Trustees' course of conduct" (R. 33, par. 34). The City did not rely upon a failure to receive a mailed notice. It is clear throughout that the City knew it was dealing with trustees of a railroad in reorganization (R. 38-39, par. 45).

The affidavit of George H. Webster, Tax Agent of the Railroad, recites (R. 20, par. 11) that the City of New York had actual notice of the reorganization by June of 1936 or earlier.

Even though personal service is not impossible or impractical, service by publication may be quite reasonable. See *Security Bank* v. *California*, 263 U. S. 282, 288, which involved statutory escheat of bank deposits. If the party affected has the required information, the object of the notice is satisfied.

The City never filed any claims or petition to enforce a lien. The property was in possession of the trustees. The City has stood outside the bankruptcy proceedings.

In his Memorandum of Decision Judge Hincks said (R. 91-92):

> "No contention is made that the procedure of Sec. 77 was not faithfully followed in these proceedings, or even, if that be important, that the City lacked knowledge of the pendency of these proceedings under

> Sec. 77. Thus the City was chargeable with knowledge throughout that if the claims were not filed it might not participate."

The filing of the petition was a *caveat* to all the world. See *Mueller* v. *Nugent*, 184 U. S. 1, 14.

Subsection 77 (c) (8) calls for "reasonable notice * * * by publication or otherwise." If the creditor has knowledge of the proceedings in time to give it opportunity to avail itself of the rights and privileges accorded to other creditors its claim is barred. See subsection 17 (a) (3) and *Birkett* v. *Columbia Bank*, 195 U. S. 345, 350.

In *St. Louis & San Francisco R. R. Co.* v. *Spiller*, 274 U. S. 304, the plaintiff had obtained a judgment in 1916 for overcharges against the old company, and in 1916 the old railroad was sold to the new on foreclosure. The bar order was published. Spiller had no actual notice, failed to file a claim. The opinion says (p. 313):

> "There is no evidence in the record which supports the assertion that Spiller was not afforded an opportunity of participating in the reorganization. The contrary appears. The order confirming the foreclosure recites that 'a fair and timely offer of cash * * * or participation' was made to those unsecured creditors who had filed claims. Spiller did not file his claim. The fact that he did not have actual knowledge of the order limiting the time for filing claims is not material in this connection. Notice by publication was legally sufficient."

In *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, relied on by the City (Brief, pp. 29-30), the controversy questioned the constitutional sufficiency of notice to beneficiaries in judicial settlement of accounts by the trustees of a common trust fund established under the New York Banking Law. The Trust Company petitioned the Surro-

gate's Court for settlement of its first account as common trustee. Notice was given the beneficiaries by publication under Banking Law, § 100 (c) (12). It was held that the New York statute was unconstitutional as applied to known beneficiaries of known places of residence. The purpose of the notice is to apprise interested parties (pp. 314-315). This Court does not commit itself to any formula (p. 314). In the case at bar the City of New York knew of the reorganization proceedings and the publication served as "an additional measure of notification" (p. 318).

In *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, notice by publication as prescribed by the New Jersey Escheat Act, with reference to unclaimed stock and dividends of Standard Oil of New Jersey, was upheld as constituting due process.

We refer to the following cases on the question of notice:

Chicago Joint Stock Land Bank v. *Minnesota L. & T. Co.*, 57 F. 2d 70 (C. C. A. 8, 1932). Court entered bar order in receivership proceeding. Creditor acquired notice of the proceeding. "It had knowledge of the receivership and was charged with notice that the receivers could act only pursuant to order of court. It also was placed upon inquiry as to all proceedings taken in the receivership matter, including the order limiting the time for filing claims" (p. 73).

Duryee v. *Erie R. Co.*, 76 F. Supp. 635 (N. D. Ohio, 1948), aff'd 175 F. 2d 58 (6th Cir., 1949), cert. den. 338 U. S. 861. This was a § 77 proceeding. All parties were notified of all hearings with reference to the Plan, and notices of the hearings and action were published in newspapers. After confirmation of the Plan a final order under subsection 77 (f) was entered. The opinion says (p. 637):

> "Creditors would not participate in reorganizations if they could not feel that the Plan is final. Courts

have generally held that all creditors who had knowledge of bankruptcy proceedings are bound by the discharge of the debtor, even if they were not given specific notice and even though their claims were not filed, and Section 17 of the Bankruptcy Act, 11 U. S. C. A., § 35, so provides."

In re Corona Radio & Television Corporation, 102 F. 2d 959 (C. C. A. 7, 1939). Petition was filed in 77 B proceedings for allowance of claim after final decree. Petitioners urged that they had no notice of the entry of the final decree.

"It is admitted they had knowledge of the reorganization proceedings while doing business with the debtor, and could, no doubt, have protected themselves adequately during that time" (p. 963).

Mohonk Realty Corporation v. *Wise Shoe Stores*, 111 F. 2d 287 (C. C. A. 2, 1940), cert. den. 311 U. S. 654. Appellant was a party to the reorganization proceeding and received notice of the confirmation hearing. But the order winding up the estate was issued *ex parte*, without particular notice to appellant.

"The failure to give notice did not make the order invalid for lack of jurisdiction. A reorganization plan consummated under Chapter X is binding even as against creditors who were never scheduled and who never knew of the proceeding" (p. 290).

Piedmont Ice & Coal Co. v. *American Service Co.*, 130 F. 2d 78 (C. C. A. 4, 1942). Piedmont sold plant to Community Utilities which sold to Community Ice. Piedmont sued Community Ice in 1929 on contract claim and secured judgment in 1937. American Service Co. took over Community Ice in 1929 shortly after suit. In 1934 American Service Co. filed a petition for reorganization. Notice was given by publication only. It was held that

Piedmont should have known of the pendency of the reorganization proceeding. Suit was barred by the final decree.

McColgan v. *Maier Brewing Co.*, 134 F. 2d 385 (C. C. A. 9, 1943), cert. den. 320 U. S. 737. The tax officials had knowledge that the property of the corporation was in receivership. Even though the franchise taxes were made liens, and the receivers were subject to the state taxes, it was held that 28 U. S. C., § 124 (a) did not dispense with the necessity for making timely demand for payment.

Knapp v. *Detroit Leland Hotel Co.*, 153 F. 2d 715 (C. C. A. 6, 1946). The opinion says (p. 717):

> "Assuming that appellant took defaulted bonds, he was bound to know of the reorganization proceedings. He was bound to take notice of Section 77B, together with the specific provision that upon confirmation of a plan, the plan and its provisions are binding not only upon the debtor, but 'upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proof of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable. * * *' Title 11, U. S. C. § 207, sub. g, 11 U. S. C. A. § 207, sub. g."

Duebler v. *Sherneth Corporation*, 160 F. 2d 472 (C. C. A. 2, 1947). This case involved the issue of the power of a bankruptcy court to reopen a reorganization decree sometime after the final period to permit of the exchange of securities in accordance with the reorganization plan. It was held that notice by publication only of the order of confirmation and the final order was adequate, even though the particular bondholders had no actual notice or knowledge of the reorganization proceedings.

Willis v. *Consolidated Textile Co.*, 178 F. 2d 924 (2 Cir., 1950), cert. den. 339 U. S. 957; affirmed lower court on authority of the *Duebler* case.

There is a presumption in favor of actual notice, and the Record contains no rebuttal of the presumption by the City. See *In re Zimmerman*, 66 F. 2d 397, 399 (C. C. A. 2, 1933).

Finletter in *The Law of Bankruptcy Reorganization* says (pp. 673-674):

> "In ordinary bankruptcy a claim which is not listed in the bankrupt's schedules will not be barred unless the creditor had notice or actual knowledge of the proceedings. Under Chapters XI and XII this rule of ordinary bankruptcy obtains but under Chapter X and Section 77 the plan when confirmed is binding on all creditors, whether or not their claims have been filed; and the final decree under Chapter X discharges the debtor from its debts and liabilities except as provided in the plan or an order of the court. The ordinary bankruptcy rule is thus changed in proceedings under Chapter X and Section 77 and even if notice of the proceedings has been intentionally kept from a creditor the debt will be discharged. The court however has discretion, not to maintain the debt as such in force, but to allow a creditor to participate in the plan for cause shown even after the time for filing of claims has passed. This discretion must expire, however, when the plan is put into effect, for to allow a creditor to come into the plan after it is consummated would be to permit a collateral attack on the order of confirmation. The plan is necessarily based on the existence of a maximum amount of creditors and, as the rights of third parties will usually have intervened with the consummation, the increase of the number of participants in the plan is as much a collateral attack as if the creditors were allowed to prove the claim against the new company."

In the Court of Appeals the City did not complain of lack of knowledge or notice by publication. It contended that the filing of a notice of claim could have related only to the distribution of the general assets in which the City had no right to participate, and so the filing of a notice would have been a futile act (City's brief, p. 20); that the bankruptcy court had jurisdiction over tax liens only if the taxing authority appeared voluntarily in the proceedings or if the trustees applied to the court, on notice to the City, for adjudication of the legality or amount of the assessments (pp. 16, 19). The City's position was that it was not to file a claim under any circumstances. With or without notice, it did not intend to appear voluntarily or file a claim. The question of notice by publication or notice by mail becomes wholly immaterial because of this attitude.

The City argued that the word "claims" in subsection 77 (b) does not include statutory tax liens (pp. 8-14); that subsection 77 (c) (7) applies to tax claims but not to tax liens (p. 15); that the filing of a notice of claim would have been a futile act (p. 20); that the City was under no obligation to file a notice of claim or to take any affirmative action in preservation of its liens (p. 22); that the trustees were required to pay the liens or to petition the reorganization court for an adjudication as to their legality (p. 25). There was no complaint of inadequacy of notice by publication under subsection 77 (c) (8), but complaint that no specific notice had been given that the legality or the amount of the assessment would be questioned (pp. 15-16). It was the contention that failure to comply with the requirements of a general notice to creditors to file claims does not cut off statutory liens (p. 16).

This argument is not sound. To file a claim is not a mere formality or necessarily to adjudicate the legality or amount of the liens. Claims are filed for the purposes

of the plan. Subsection 77 (c) (7). The City cannot sit idle. It should file its claims or "set up a claim of lien upon security in the possession of the trustee by an intervening petition filed in the bankruptcy proceeding." *DeLaney* v. *City and County of Denver, supra,* 185 F. 2d 246, 251-252 (10th Cir., 1950). In other words, the City deliberately filed no claim, erroneously to be sure, and consequently suffered no damage by reason of the fact that the notice to file was published and not mailed.

The Railroad had always believed the City's assessments to be invalid as a matter of law and void *ab initio* (R. 2, 18). The City admits (Brief, p. 20) that assessments on right of way are invalid, but says (Brief, footnote p. 21) it must be assumed that these assessments were not on right of way. There is no basis for such an assumption, and it is not true in fact. During all the years from 1894 that the assessments existed, the City made no attempt to enforce them. It could not reasonably be expected that the debtor or its trustees would mail notice of Order No. 32 to the holders of such stale and invalid claims. The City knew of the Railroad's reorganization, and the burden under Section 77 rested upon it to come forward and file a claim if it still had any interest in enforcing its assessments and any belief that they were valid.

The record contains no reference to a judge's order to file a list of known creditors pursuant to subsection 77 (c) (4). There is no connection between the preparation of such a list and the duty to file claims. Furthermore, any failure of this nature cannot be attacked collaterally. *Mohonk Realty Corporation* v. *Wise Shoe Stores, supra,* 111 F. (2d) 287 (C. C. A. 2, 1940).

POINT IV.

The proceedings had in reorganization, the Plan of Reorganization, and the Consummation Order and Final Decree were intended to and did bar the liens.

With reference to construction Judge Hincks said (R. 88-89):

> "In short, on the point of construction none of the City's arguments have sufficient substance to alter my conclusion that it was the intent of the plan that the reorganized company should take free and clear of all claims not filed in the reorganization proceeding including those of the City now under consideration."

The trial judge had charge of the reorganization proceeding for 12 years, and this conclusion was within his discretion. See Section R of Plan (R. 75-76) and *Kelby* v. *Prudence-Bonds Corporation*, 140 F. 2d 185, 186 (C. C. A. 2, 1944).

Order No. 822, the decree confirming the Plan of Reorganization, dated September 6, 1945, contains this language (R. 60):

> "That the provisions of said plan of reorganization and of this order, subject to the right of judicial review, shall henceforth be binding upon the several debtors herein, all stockholders thereof, including those who have not, as well as those who have, accepted said plan, and all creditors secured or unsecured, whether or not adversely affected by said plan, and whether or not their claims have been filed, and, if filed, whether or not approved herein, including creditors who have not, as well as those who have, accepted said plan."

It also decrees (R. 60) that the property "shall be free and clear of all claims of the several debtors herein, their stockholders and creditors, and free and clear of all liens and other encumbrances, except as provided in said plan and in this order * * *."

Order No. 1007, the Consummation Order and Final Decree, dated September 11, 1947, reads in part (R. 66):

> "3. *Transfer and Discharge.* Upon the consummation date:
>
> "(i) all the business and affairs and the entire property and estate of the Debtor and the Secondary Debtors of every name and nature and all right, title and interest of * * * Trustees of the property of Debtor and the Secondary Debtors * * * shall vest in and become the absolute property of the Reorganized Company, free and clear of all claims, rights, demands, interest, liens, encumbrances of creditors or other obligees of the Debtor, or of the Secondary Debtors, or their properties, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company and of all rights and claims of the holders of shares of the capital stock of the Debtor and the Secondary Debtors; * * *."

Order No. 1007 provides for assumption of certain obligations, some of them liens (R. 67-68).

The deed of September 18, 1947, from the trustees to the reorganized company provided that the conveyance was "subject also, in so far as the property by this Indenture remised, released, transferred, assigned, conveyed, quit-claimed and set over may be subject to the liens of taxes and assessments lawfully levied or assessed against the same, to any and all such liens" (R. 30). The property continued subject to liens of assessments lawfully assessed against the property, that is, liens reserved by

the Plan and the Consummation Order. This appears from the clause in the deed reading (R. 18-19): "* * * free and clear of all claims, rights, demands, interests, liens, encumbrances of creditors or other obligees * * * of the Trustees or their predecessors * * * except the obligations imposed * * * by the Consummation Order or assumed * * * pursuant to the Consummation Order * * *."

Section L of the Plan of Reorganization provides (R. 71) that claims, to the extent unpaid at the date of confirmation of the Plan, shall be paid in cash or assumed by the Reorganized Company. Judge Hincks construed (R. 87-88) the word "claims" in Section L to have the same meaning as the word in § 77, that is, filed claims, and by reason of subsection 77 (c) (7), the City's claim, not having been filed, is not entitled to participate or entitled to priority. To hold otherwise is to contradict the plain language of Section L of the Plan.

In subdivision N (4) of the Plan (R. 73) the Reorganized Company was directed to pay any and all taxes due the United States, the Commonwealth of Massachusetts and any city, town or other political subdivision thereof from the Old Colony Railroad "without requiring proof thereof in the reorganization proceeding and without prejudice by reason of not having been approved in such proceeding * * *." Similarly, by subdivision O (2) the New Haven was to pay taxes due from the Boston and Providence Railroad (R. 75). Referring to the tax liens of the City of Boston on property of the Old Colony, Judge Hincks said (R. 88) that the Boston liens had been properly submitted to the Court for an order of payment and those liens were expenses of administration. "That no such provision was stated for the City's [New York] liens imparts an intent that no similar exception of the City's liens was intended" (R. 88). Where waiver of filing of claims was allowed, it was done in specific language. The absence in § 77 of an express waiver of the

requirement of filing state and municipal tax and assessment claims, and the absence in the Plan of any such waiver as far as the City was concerned, indicate strongly that municipal claims must be filed unless expressly waived.

Order No. 736 of March 13, 1944 [(R. 50-54), see also R. 56)] divided certain creditors and stockholders into classes for the purpose of the Plan and its acceptance. The Order was concerned with creditors entitled to vote on the Plan (R. 50). If the City had filed a claim and it had been approved, the City would not have been adversely affected by the Plan and would not have been entitled to vote on the Plan. Subsection 77 (e). Even if the City would have been adversely affected by the Plan, it would not have appeared among the list of those entitled to vote on the Plan unless it had filed a claim (R. 87).

The City refers (City's brief, p. 39) to the first report of the Interstate Commerce Commission approving the original Plan of Reorganization and says there is no indication of intention to disturb pre-existing tax liens (R. 48-49). Only filed claims were covered by Section L of the Plan. For the first report not to mention the liens of the City, which were not presented to the Commission, is neither a negative nor an affirmative indication with respect to the liens and the omission is consistent with the position taken by the courts below.

The courts below concluded (R. 86, 88) that the Final Decree provided that the entire property should vest in the Reorganized Debtor free and clear of all claims and liens except for the claim referred to. Some twenty-seven obligations were to be assumed; but these did not include the City's liens.

The courts below concluded (R. 87) that Order No. 736, classifying creditors and stockholders for the purpose of the Plan did not include the City because of the absence of any approved claims.

The courts below concluded (R. 87-88) that the City was not within the contemplation of Section L of the Plan because the City's claim was never filed and was not, therefore, entitled to priority under Section L.

The courts below also concluded (R. 88) that the deed did not impose the City's liens on the reorganized corporation because of the wording of the Final Decree. The deed, of course, could not lawfully violate the provisions of the Plan.

The purpose of reorganization is to review all claims. It would defeat this purpose if secured creditors could stand aside. The Final Decree established new rights to the property. Any modification of the Decree would prejudice these new rights. Subsection 77 (f) makes the Plan and Order of Confirmation binding upon "all creditors secured or unsecured, whether or not adversely affected by the Plan, and whether or not their claims shall have been filed * * *". It also directs that "property dealt with by the plan, when transferred and conveyed to the debtor * * * shall be free and clear of all claims of * * * creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance * * *."

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent.

ROBERT M. PEET,
JAMES D. O'NEILL,
Of Counsel.

APPENDIX.

Pertinent Sections of National Bankruptcy Acts.

Subsection 17 (a) (3), Act of July 1, 1898, c. 541, § 17, 30 Stat. 550, as amended by Act of June 22, 1938, c. 575, § 1, 52 Stat. 851, 11 U. S. C., § 35 (a) (3), reads in part as follows:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; * * *."

Subsection 57 (n), Act of July 1, 1898, c. 541, § 57, 30 Stat. 560, as amended by Act of May 27, 1926, c. 406, § 13, 44 Stat. 666, 11 U. S. C., § 93 (n), prior to 1938 read in part as follows:

> "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment; * * *."

Subsection 57 (n), Act of July 1, 1898, c. 541, § 57, 30 Stat. 560, as amended by Act of May 27, 1926, c. 406, § 13, 44 Stat. 666, as amended by Act of June 22, 1938, c. 575, § 1, 52 Stat. 866, 11 U. S. C., § 93 (n), was amended in 1938 to read in part as follows:

> "Except as otherwise provided in this title, all claims provable under this title, including all claims

of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however*, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: * * * When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case."

Subsection 64 (a), Act of July 1, 1898, c. 541, § 64, 30 Stat. 563, as amended by Act of May 27, 1926, c. 406, § 15, 44 Stat. 666, 11 U. S. C., § 104 (a), prior to 1938 read as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

Subsection 64 (a), Act of July 1, 1898, c. 541, § 64, 30 Stat. 563, as amended by Act of May 27, 1926, c. 406, § 15, 44 Stat. 666, as amended by Act of June 22, 1938, c. 575,

§ 1, 52 Stat. 874, 11 U. S. C., § 104 (a), was amended in 1938 to read in part as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court * * *."

Subsection 67 (d), Act of July 1, 1898, c. 541, § 67, 30 Stat. 564, as amended by Act of June 25, 1910, c. 412, § 12, 36 Stat. 842, 11 U. S. C., § 107 (d), prior to 1938 read as follows:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein."

Subsection 67 (b), Act of July 1, 1898, c. 541, § 67, 30 Stat. 564, as amended by Act of June 22, 1938, c. 575, § 1, 52 Stat. 875, 11 U. S. C., § 107 (b), was amended in 1938 to read as follows:

> "The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and

debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

Subsection 77 (a), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (a), reads in part as follows:

"If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Subsection 77 (b), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, 11 U. S. C., § 205 (b), prior to 1935 read in part as follows:

"The term 'creditor' shall, except as otherwise specifically provided in this section, include, for all

purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this title."

Subsection 77 (b), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (b), was amended in 1935 to read in part as follows:

"The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Subsection 77 (c) (4), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (c) (4), reads in part as follows:

"The judge * * * shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, * * *"

Subsection 77 (c) (7), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774,

49 Stat. 911, 11 U. S. C., § 205 (c) (7), reads in part as follows:

> "The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests."

Subsection 77 (c) (8), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (c) (8), reads as follows:

> "The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

Subsection 77 (f), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (f), reads in part as follows:

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

Subsection 77 (j), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (j), reads in part as follows:

> "In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: * * *"

Subsection 77 (l), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (l), reads as follows:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Subsection 77 (o), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (o), reads in part as follows:

> "The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. * * *"

Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
—against—
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO MODIFY JUDGMENT AND TO STAY MANDATE.

EDWARD R. BRUMLEY,
Counsel for Respondent,
Room 3841, Grand Central Terminal,
New York 17, N. Y.

ROBERT M. PEET,
JAMES D. O'NEILL,
Of Counsel.

THE COURT PRESS, N. Y. C.

Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
—against—
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

Motion to Modify Judgment and to Stay Mandate.

Respondent respectfully moves this Court to modify its judgment in this cause, dated January 12, 1953, so as to direct the District Court to take evidence on the question whether or not the City of New York had actual knowledge of Order No. 32, the bar order directing creditors to file claims in the reorganization proceedings, and respectfully requests that the mandate of this Court be stayed pending its decision of this motion.

The opinion of this Court holds that the City of New York was a "creditor" within the meaning of Section 77 of the Bankruptcy Act but that it was freed from the duty laid upon creditors of filing a claim in the reorganization proceedings, pursuant to Order No. 32 entered therein, owing to lack of adequate notice of this order. Since the City was a creditor, its failure to file any claim would

have barred its claim had it received actual notice, by mail or otherwise, of the bar order.

Admittedly respondent did not mail a copy of the bar order to the City, but relied instead on notice by publication and the duty of the City to file its claim because it knew of the reorganization proceedings. Respondent has reason to believe that the City had actual notice of the bar order other than by receiving from respondent a mailed copy. Respondent further believes that if proof of actual knowledge of the bar order by the City had existed in the record reviewed, this Court would have affirmed rather than reversed the judgment of the court below. Respondent therefore desires to have evidence taken in the District Court on this issue.

This precise issue was not mentioned in the original pleadings, their supporting affidavits or the decision of the District Court, and no testimony or evidence was received on the point. Respondent's theory, supported by the cases cited in its brief to this Court and later by the decisions of the District Court and Court of Appeals, was that notice to the City by publication, together with its knowledge of the reorganization proceedings, was sufficient. This was the theory of its petition and supporting affidavit in the District Court (R. 3, 20). The opposing affidavit of the City denied personal service of the bar order but did not deny actual knowledge of it (R. 37). The theory of the City was that its rights could not be affected without personal service of a notice specifically directed to it ordering its claims to be filed or by its voluntary submission of its claims to the District Court (R. 37). The District Court accepted the theory of the petition and took no evidence and made no finding on the question whether or not the City had actual notice of the bar order (R. 81, 86, 91-92). The dissenting opinion of Judge Frank in the Court of Appeals erroneously and without foundation in the record stated that the City had

no actual knowledge of the bar order (R. 95, 97, 99), although it agreed that actual knowledge would have been sufficient to bar the City (R. 100). The City has never denied actual knowledge of the bar order in any writing in the District Court, the Court of Appeals or this Court.

The respondent therefore believes itself entitled to a hearing in the District Court on a matter not decided below and never before deemed important until the opinion of this Court made it critical.

Willing v. *Binenstock*, 302 U. S. 272 (1937).

Accordingly, respondent respectfully prays that the judgment of this Court be modified so as to remand the case to the District Court for further proceedings consistent with the view that the District Court hold a hearing on the question whether or not the City of New York had actual knowledge of Order No. 32 of the reorganization proceedings of respondent and thereafter enter appropriate judgment between the parties, and respondent further prays respectfully that the mandate of this Court be stayed pending its decision of this motion.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent.

ROBERT M. PEET,
JAMES D. O'NEILL,
Of Counsel.